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OF

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ERRATA

Page 21, line 3 from bottom, for (37) read (38)
Page 29, first line of syllabus, for (1002) read (413)

ERRORS NOTED IN PREVIOUS VOLUMES

Vol. 91 Wash.

Page 421, line 3 from top, for co-ordained read co-ordinate

Vol. 101 Wash.

Page 659, line 4 from bottom, for deceased read deceased's

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CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 14705. Department One. October 14, 1918.]

WALTER H. WHEELER, *Respondent*, v. EDWARD PITWOOD *et al.*, *Appellants*.[1]

CONTRACTS (36, 38)—REQUISITES—VALIDITY OF ASSENT—FRAUD—EVIDENCE—SUFFICIENCY. An engineer and contractor is not shown to have been guilty of fraud in securing a contract to furnish diagrams and steel for a building, by false representations as to the amount of steel required, where, upon invitation, he merely made a lump sum bid on the job, agreeing to furnish all the steel required, as shown by blue prints and drawings furnished to him, from which he estimated about 45 tons of steel would be needed, and from which any competent person could figure the amount required, subject to a variation of 10 per cent; although the job actually required but 39 or 40 tons.

EVIDENCE (169)—PAROL EVIDENCE TO VARY WRITING—PRIOR ORAL AGREEMENT—TIME FOR PERFORMANCE. Where a written contract to furnish material for a building did not specify the time for delivery, a reasonable time will be implied, and evidence of a prior oral agreement is inadmissible to vary the construction legally implied from the writing itself.

CONTRACTS (134)—CONSTRUCTION — BUILDING CONTRACT — "STOCK SHIPMENTS"—REASONABLE TIME. A contract by an engineer to furnish diagrams and structural steel for a building, which provided that he was to proceed at once to order the steel from a certain jobber, all steel to be "stock shipments," is complied with by ordering from the jobber, although a small portion had to be ordered by the jobber from the mill because not in stock, where it was all furnished within the reasonable time called for by the contract.

[1]Reported in 175 Pac. 289.

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered November 3, 1917, upon findings in favor of the plaintiff, in an action to foreclose a mechanics' lien, tried to the court. Affirmed.

Cannon & Ferris, for appellants, contended, *inter alia,* that if a person knowingly makes a false statement, even as to matters of opinion, for the fraudulent purpose of deceiving another, and thereby inducing him to enter into a contract or assume an obligation which he would not otherwise have entered into or assumed, it is a fraudulent misrepresentation, calling for relief or damages. Black, Rescission and Cancellation, pp. 194, 531; *Sowles v. Fleetwood,* 97 Wash. 166, 165 Pac. 1056; *Duffy v. Blake,* 80 Wash. 643, 141 Pac. 1149; *Becker v. Clark,* 83 Wash. 37, 145 Pac. 65; *Edward Barron Estate Co. v. Woodruff Co.,* 163 Cal. 561, 126 Pac. 351, 42 L. R. A. (N. S.) 125, 132; *Hingston v. L. P. & J. A. Smith Co.,* 114 Fed. 294; *Macdonald v. De Fremery,* 168 Cal. 189, 142 Pac. 73; *Brandt v. Krogh,* 14 Cal. App. 39, 111 Pac. 275; *Scott v. Burnight,* 131 Iowa 507, 107 N. W. 422; *Gordon v. Hillman,* 91 Wash. 490, 158 Pac. 96; *Crawford v. Armacost,* 85 Wash. 622, 149 Pac. 31.

Respondent is liable for failure to deliver from stock instead of from the mills, and the consequent delay and damage. *Bavaria Inv. Co. v. Washington Brick, Lime & Sewer Pipe Co.,* 82 Wash. 187, 144 Pac. 68; *United States v. Gleason,* 175 U. S. 588; *Kelley, Maus & Co. v. La Crosse Carriage Co.,* 120 Wis. 84, 97 N. W. 674, 102 Am. St. 971; *Brownell v. Chapman,* 84 Iowa 504, 51 N. W. 249, 35 Am. St. 326; *Danenhower v. Hayes,* 35 App. D. C. 65, 33 L. R. A. (N. S.) 698, and note.

Hamblen & Gilbert, for respondent.

MITCHELL, J.—This action was brought by respondent to foreclose a lien upon the property of appellants Edward Pitwood and wife, on account of reinforcing diagrams and steel furnished in changing a building of appellants in Spokane from mill construction to a fireproof building with reinforced concrete floors. The defense was false representation as to the amount of steel to be furnished for the contract price, false representation as to the time of delivery of the steel, and failure to deliver as agreed; all knowingly done to induce appellants to enter into the contract; and because of the failure of respondent to furnish steel in the amount and within the time agreed, appellants demanded damages. Defendant Welsh Investment Company is not interested in this appeal. There was judgment foreclosing the lien as demanded in the complaint.

Respondent, who resided in Minneapolis, was an engineer and contractor of structural iron work, and sold reinforcing steel used in such work, having had assigned to him certain territory (which included Spokane) by the C. A. P. Turner Company of Minneapolis, which company was a heavy jobber in steel of that character carried by it to supply its customers, including respondent, who represented the Turner Company in placing what is called the "Turner Spiral Mushroom System," the kind that was used in the Pitwood building. The system included necessary working reinforcing diagrams and plans, including those for the laying of the steel. One P. F. Kennedy was in the employ of respondent as a solicitor of business in Spokane and became active to get the Pitwood job. Several other persons made bids on a per-ton basis for whatever steel was used, agreeing also to furnish working diagrams. Mr. Kennedy had several talks with appellant and was advised of prospective storage patrons of the building for the following winter. Mr. Kennedy spoke of the

advantage of prompt delivery, or "stock" shipment, his principal could give, and it appears that respondent was advised thereof by Mr. Kennedy. On July 28, 1916, Mr. Kennedy wrote respondent at Minneapolis asking that he make a bid on the job, inclosing in his letter preliminary sketches, not working drawings, consisting of blue-prints of floor plans furnished by appellants' architect. Using the preliminary sketches, which generally varied, it seems, from working drawings as much as ten per cent, for the purpose of determining the amount of material required, respondent figured that about forty-five tons of reinforcing steel would be required, and promptly submitted a written contract, which, with one slight change, to be noticed hereafter, was signed by the parties on the dates and at the cities shown by the contract. The contract, consisting of an offer and acceptance, is as follows:

"Seller's Original Copy.

"Minneapolis, Minn., July 31, 1916.

"Dr. E. Pitwood,

"503 Hyde Bldg., Spokane, Wash.

"Dear Sir: Referring to blue-prints of sketches of your architects, Hyslop and Westcott, showing plans of first, second, third and fourth floors of your warehouse building sent me by Mr. P. F. Kennedy of your city, also to the blue-print of my drawing No. 1, revised showing framing plans for your said building, which I understand you propose to convert from mill construction building to a fireproof building with reinforced concrete floors;

"My price for the necessary reinforcing diagrams and reinforcing steel for said building is Four Thousand Nine Hundred Sixty Dollars ($4,960) steel delivered f. o. b. shipping point and allow freight to Spokane, Washington. Steel all stock shipment. Steel all straight, cut to length, except spirals for column tops which will be furnished coiled with spacing bars, column spirals which will be furnished coiled to the

proper diameter and column and beam bars which will be furnished bent to detail. The above price is based on using the 'Turner Spiral Mushroom System' of reinforced concrete construction, designed in accordance with our standard practice as approved by C. A. P. Turner of Minneapolis, Minn.

"I include in the above proposition the necessary reinforcing diagrams and reinforcing steel for only the following items: column footings, columns, 2d, 3d, 4th floor slabs and roof slab, necessary interior and spandrel beams supporting same, reinforced concrete stairs.

"Terms: Terms shall be cash thirty days from steel delivery days, payments to be made from time to time as steel is delivered in funds current in New York, N. Y., at the office of Walter H. Wheeler, 1112 Met. Life Bldg., Minneapolis, Minn. I to proceed at once to order the necessary reinforcing steel required by my said diagrams soon as said diagrams are complete and steel lists made. I make the foregoing proposition for acceptance in writing at my said office on or before August 7, 1916, as per form of aceptance as hereon below written. After said date same will be subject to change without notice.

"The above is all contingent upon strikes, accidents, delays of carriers and other delays unavoidable and beyond my control. I estimate said work will require about 755 cu. yards of concrete and 50 tons of reinforcing steel. Yours truly, (Signed)

"Walter H. Wheeler.

"Signed August 10, 1916, at Minneapolis, Minn."

"Spokane, Washington, August 5, 1916.

"Mr. Walter H. Wheeler,

"1112 Metropolitan Life Bldg.,

"Minneapolis, Minn.

"Dear Sir: Referring to your foregoing proposition offering to furnish me the necessary reinforcing diagrams and reinforcing steel for remodeling my warehouse, for which Hyslop & Westcott are architects, I hereby accept your said offer as above and agree to pay you for the use of said reinforcing diagrams and

for the necessary reinforcing steel as above the sum of $4,960. I to pay the freight on all steel shipped in by you. You to credit me with the amount of said freight when paid, provided I furnish you the original freight bills for same receipted by the transporting railway companies. Terms to be cash 30 days from the steel delivery days, payments to be made you from time to time as steel is delivered, in funds current in New York, N. Y., payable to the order of Walter H. Wheeler, at his office 1112 Met. Life Bldg., Minneapolis, Minn. You to proceed at once to order said steel as soon as your reinforcing diagrams and steel lists are complete. It is understood steel delivery is f. o. b. point of shipment. Yours truly,

"(Signed) Edward Pitwood.

"Signed at Spokane, Washington, August 5, 1916."

In the contract as forwarded by respondent, the last sentence above the place for the signature of respondent was:

"I estimate said work will require 755 cu. yds. of concrete and not more than 50 tons of reinforcing steel."

Appellants' architects objected to the words *"not more than,"* insisting that respondent was to furnish all the steel required by the items in the contract, whereupon the last sentence in that portion of the contract was rewritten to read as shown in the contract, and then signed by the appellant. It was then forwarded to the respondent, who signed it on August 10, 1916.

As soon as appellant signed the contract in Spokane, Mr. Kennedy advised respondent by wire, whereupon respondent, after a week's work, prepared complete working plans and diagrams from which he figured accurately the amount of steel needed, and promptly ordered all the steel from the Turner Company of Minneapolis. The Turner Company's stock of steel varied, of course, according to its sales and purchases, the lat-

ter of which were occasionally affected by some delay of supply from the mills, and a small part needed in this order had to be gotten from the mill by the Turner Company after receiving the order. The steel was forwarded to Spokane in three shipments, as follows: August 15th, September 5th, and October 7th. It arrived at Spokane on August 25th, September 26th, and October 13th. There is ample proof that the steel was shipped and received within a reasonable time, considering both the general transportation conditions and steel market at that time. All steel needed was furnished, and it amounted to between thirty-nine and forty tons. Severe and continuous winter weather came on about November 1, somewhat earlier than usual, preventing the completion of the building until late in the winter. Appellants refused to pay the contract price.

Appellants, in presenting the cause, reduce their contentions to two points: First, shall the respondent recover the amount of his contract where he intentionally, or by design, misrepresents a material fact or produces a false impression in order to mislead the other, he having accomplished his design to appellants' damage; and second, where an agreement is entered into to furnish material from "stock" in less than two weeks and an excess price is paid for stock shipment, has the party complied with his agreement when he furnishes "mill shipment," which takes a much longer time; and may not the party injured recover damages resulting thereby?

Appellants contend, in support of their first proposition, that, at the time the contract afterwards signed was proposed by respondent, he was advised by the blue-print sketches that had been furnished him how to accurately determine the amount of steel required; that he did so determine, and that, by the terms of the

proposed writing, he purposely misrepresented that fifty tons would be needed instead of between thirty-nine and forty tons; that he knew appellants relied on it, and that the statement was made to deceive, and did deceive, appellants to their damage. With such idea of the facts, our attention is called by appellants to a splendid line of cases from this and other courts, the doctrine or rule of which may be clearly exemplified by reference to two of the cases in this court, as follows: *Wooddy v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 132 Am. St. 1102, wherein the court say:

"All the cases agree that the purchaser may rely upon representations of the vendor where the property is at a distance, or where for any other reason the falsity of the representations are not readily ascertainable; . . ."

and the case of *Sowles v. Fleetwood*, 97 Wash. 166, 165 Pac. 1056, to the effect that, upon the sale of the furniture and good will of a hotel business, false representations as to the value of the business and amount of monthly profits, peculiarly within the knowledge of the seller and inducing the sale, may be relied upon by the purchaser.

In this matter, appellants argue that, in alleging respondent intended to deceive, they are strongly fortified by a letter written on September 13, 1916, by respondent in answering a letter of Mr. Kennedy stating that, on checking over the steel furnished, appellants' architects expressed dissatisfaction that there was considerably less than fifty tons. In his letter respondent wrote:

"Regarding the quantity of steel, I have to furnish under my contract the steel called for by my reinforcing diagrams and that is all. My estimates of quantities I always try to make liberal. Our competitors make it a practice to estimate the tonnage of steel ex-

cessively large so as to make their price per ton appear lower, and we have to follow their example to some extent, or be at a disadvantage. I have already gone into my own pocket to quite an extent more on this job than I had to under my contract, in order to give service and satisfaction, and I shall expect prompt payments in full as per invoice and contract."

We do not agree with appellants' understanding of the facts, and hence consider the authorities cited as inapplicable. Respondent was never requested nor employed to say how much steel would be needed. He was asked to bid on the job and, if successful, was to furnish accurate working plans and diagrams for a special patented system and all the reinforcing steel required. For making a bid he was furnished an architect's preliminary sketches, which for the purpose of advice (and considering the variations in weight of steel bars) are, without dispute, flexible to the extent of ten per cent. Surely, in such circumstances, a bidder is not called upon to prepare, at the expense of much time and labor, valuable working drawings essential to accuracy for ascertaining the amount of steel required in order to escape the imputation of fraud and intentional deceit. He was to bid on the job and, with the sketches furnished, calculated as best he could, the amount of steel required at forty-five tons. Thereupon, and bearing in mind the uncertainty of figures based on preliminary sketches, respondent proposed a contract providing as an estimate *not more than* fifty tons of reinforcing steel. But appellants' architect objected to the words "*not more than,*" insisting that respondent was to furnish all the steel *required* by the items stipulated, etc. The architect was right, for respondent was bidding on the job and he should furnish all the steel needed; so that the three words were stricken and the contract signed. For the purpose of determining the

amount of steel finally needed, these persons were dealing at arm's length. In our opinion, respondent's letter of September 13, 1916, has no harmful bearing on his case. The contract had already been signed and nearly all the steel delivered. In what manner, within the rule of liability, does it show an overreaching mind at the time the contract was proposed by the respondent? What means of knowledge had respondent for making the estimate that was not just as accessible to appellants? He had none whatever except appellants' own sketches, from which any qualified person other than respondent could have readily ascertained for appellants the amount of steel required.

As to appellants' second proposition, they proceed upon the erroneous assumption that the material was to be furnished in less than two weeks. Over objections of respondent, there is testimony to show there were conversations and representations as to time for making delivery of the material, made by Mr. Kennedy prior and looking to the making of a contract. All such representations, however, were ignored and waived by appellants in the written contract subsequently entered into, which is silent as to time for performance.

"Where the contract fails to specify a time for completion, the builder is entitled to a reasonable time within which to perform, and it will be implied that a reasonable time for performance was intended; *and if the contract is in writing evidence of a contemporaneous oral agreement is inadmissible to vary the construction thus legally implied from the writing itself.*" 9 C. J. 780.

The same rule applies in the case of a contract to furnish *material* and *prior* representations or agreements as to time. As already mentioned, the proof shows the material was shipped and received within a reasonable time; and it is significant that, on October

18, 1916, five days after all the steel had been received, appellant wrote respondent as follows:

"I am willing to pay you upon the representations of your agent here at the rate of $100 per ton for the tonnage used as was understood by myself and witnesses all through the transaction. *The money is ready and after deducting the prepaid charges from this $100 per ton, the balance as full payment will be remitted upon notice from you.*"

Not a word written about time for performance or delay. Again, appellants claim that, because of a greater price paid, the material was to be stock rather than mill shipments, to save delay and damages to appellants, and that this plan was not followed. The contract provides:

"*I* (respondent) *to proceed at once to order* the necessary reinforcing steel required by my said diagrams soon as said diagrams are complete and steel lists made."

This same provision is repeated in appellants' written acceptance part of the contract. This provision of the contract was complied with; but, say appellants, such construction does violence to the words "steel all stock shipments" found earlier in the contract. Not so, however, for by construing them together, according to the rule, they harmonize with each other and with the facts, for the material was ordered from the Turner Company, who were large jobbers, not manufacturers, and whose system was being used, as appellants knew at the time of making the contract.

True, the jobber procured a small portion of the material from the mill to fill the order, but that is the source from which the jobber supplies all his stock. Manifestly, these provisions of the contract were for stock shipments, such as were made, rather than place the whole order with the manufacturer, who would be

slow to supply because of the magnitude of the order and prior orders and contracts. As stated above, the material was furnished within a reasonable time and appellants cannot complain.

The trial court was clearly right as to the weight of the evidence and the judgment given.

Affirmed.

MAIN, C. J., FULLERTON, TOLMAN, and PARKER, JJ., concur.

[No. 14753. Department Two. October 14, 1918.]

WILLIAM B. CLARK *et al.*, *Respondents*, v. JOHN B. SCHWAEGLER *et al.*, *Appellants*.[1]

APPEAL (387)—REVIEW—ESTOPPEL TO ALLEGE ERROR—WITHDRAWAL OF OBJECTIONS. Error cannot be assigned upon the admission of evidence objections to which were expressly withdrawn.

ATTORNEY AND CLIENT (44)—COMPENSATION—ACTIONS—EVIDENCE—ADMISSIBILITY. In an action to recover the reasonable value of services of attorneys in a trial, the files and records in the cause are competent, whether they were sole attorneys in the cause or not.

CORPORATIONS (154)—POWERS AND LIABILITIES—REPRESENTATION—PERSONS HOLDING ENTIRE STOCK. A contract employing attorneys to defend an action for divorce, involving property held by a corporation organized by husband and wife for convenient handling, the defendant holding all but one share of the stock, need not be signed by the corporation, in order to authorize recovery against the husband and the corporation; since the corporate entity may be ignored in determining the rights of the stockholders.

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered November 19, 1917, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

H. J. Snively, for appellants.

Clark & Lockhart, for respondents.

[1]Reported in 175 Pac. 300.

PER CURIAM.—Respondents recovered judgment in the court below for attorney's fees for services rendered to the appellants. It is alleged that they were employed to assist in the defense of a divorce case brought by the wife of appellant John B. Schwaegler. The parties to that case owned valuable real and personal property, and a corporation was organized to take and hold title to the real estate. The husband owned all the stock except one share owned by the wife. The husband was president and general manager and the wife was secretary. Both acted as trustees. The trial judge ignored the corporate entity and divided the property as though held by the husband individually, and directed that the officers of the corporation make all necessary conveyances to carry out the provisions of his decree. The services alleged to have been rendered ran over a period from about January, 1915, until the time of settlement and division of the property between the husband and the wife, which occurred on October 30, 1916. Respondents sued on *quantum meruit*. Appellants defended, setting up that respondent Clark was employed to sit in the trial at fifty dollars per day for an express purpose; that they had employed another attorney, who had entire charge of the litigation and drew the pleadings and handled the case; and that no real service was rendered by the respondents.

Appellants assign that the court erred (1-7) in admitting plaintiffs' exhibits I, J, K, L, O, P, and Q; (8) in denying defendants' motion for nonsuit, and (9-10) in giving instructions Nos. 10 and 12. The first six exhibits were letters written by respondents to appellants. The following occurred at the trial: "Mr. Snively: 'I am going to withdraw my objections to all these letters.' The Court: 'Very well, they will all be received then.' Whereupon exhibits I, J, K, L, O, and

P were admitted in evidence." This disposes of these assignments of error. Exhibit Q is the record in the divorce case. The files in an action wherein the services of an attorney were rendered are admissible to show their nature and value. In *Thorp v. Ramsey,* 51 Wash. 530, 99 Pac. 584, the court said:

"The files and records in a cause are entirely competent and proper for the consideration of the court and jury in an action to recover the reasonable value of services performed by an attorney in such cause; and this, whether the attorney was the sole attorney in the cause or not."

The court properly instructed the jury for what purpose this exhibit was admitted, and we must presume that the jury followed the court's instruction.

Appellants urge in support of their motion for nonsuit that respondents sued upon a joint contract and that there was no proof of employment by the corporation. There is no merit in this contention. The court had properly held that the corporation was a nominal thing, that the real controversy was between husband and wife, and that the corporation had been organized for the more convenient handling of their property. This being so, it was not necessary to prove an express contract by the corporation. The case in this respect falls squarely within the principle announced in *Boothe v. Summit Coal Min. Co.,* 55 Wash. 167, 104 Pac. 207, where, in determining the rights of stockholders in a corporation controlled by two men in equal degree, we ignored the general law as it applies to corporations and held the parties to their rights and obligations as individuals.

There is complaint as to instructions Nos. 10 and 12, but we think they were proper under the issues, evidence and the pleadings.

The judgment of the trial court is affirmed.

[No. 14758. Department Two. October 14, 1918.]

BAKER MANUFACTURING COMPANY, *Plaintiff*, v. GILBERT G. HALL *et al.*, *Defendants*.[1]

SALES (165)—REMEDIES OF BUYER—COUNTERCLAIM FOR BREACH OF WARRANTY—MEASURE OF DAMAGES. Upon counterclaim for breach of warranty, in an action for the price of graders, the defendants' measure of damages would be the difference between the purchase price and the actual value of the goods when delivered, the sale price of machinery being *prima facie* the value, and any evidence of value for the particular job in excess thereof is inadmissible as speculative.

SAME (165). In an action for the balance due on the purchase price of machinery, in which there was a counterclaim for damages for breach of warranty, it is error to give instructions limiting the allowance for damages to the balance due.

Cross-appeals from a judgment of the superior court for Pacific county, Hewen, J., entered October 8, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action on promissory notes. Reversed.

Lockerby & Wright, for plaintiff.

Fred M. Bond, for defendants.

HOLCOMB, J.—In this action both parties appeal, and we will therefore designate them as plaintiff and defendants. Plaintiff sued to recover on two promissory notes, each for $220, given by defendants, payable on July 5, 1916, and August 5, 1916, respectively, with interest at eight per cent per annum and collection charge. Defendants admitted the execution and delivery of the notes and that they are unpaid. By affirmative answer and cross-complaint, they pleaded failure of consideration, and that the notes were given as a part payment for two Maney four-wheel graders

[1]Reported in 175 Pac. 304.

or scrapers, which were sold by plaintiff under a written contract containing the following guaranty:

"These machines to be guaranteed to effect a saving of at least twenty-five per cent over a like number of No. 2 wheelers when operated in accordance with the instructions of the manufacturer and under like conditions. In consideration of which vendee agrees to pay six hundred sixty dollars as follows: $220 cash on delivery of this order, $440 in notes with interest, dated same date as bill of lading, maturing as follows: One note of $220 due sixty days from date of delivery, one note due ninety days from date of delivery."

The machines were received by the defendants on May 9, 1916, pursuant to the written contract. Defendants allege that the machines were given a fair trial, but they failed to fulfill the above warranty, and if the machines had been as warranted they would have been worth the sum of $1,000 each, while as they were they would not be worth to exceed $30 each, damaging them on this ground in the sum of $1,940.

It is alleged that, prior to the purchase of the graders from plaintiff, the defendants had secured a contract with Pacific county to construct about three and one-half miles of what is known as the "Mill Creek road;" that plaintiff, being advised of this fact, caused its agents to visit the site of the proposed road and, being familiar with the character of the work to be done, sold the machines to the defendants for use in such construction; that the actual cost of moving the 22,000 yards of earth on this job with No. 2 wheel scrapers was forty and one-half cents per yard, or a total of $8,855; that, if the graders had been as warranted, defendants would have saved twenty-five per cent of this sum, being $2,213.75.

Defendants ask judgment for the sum of $4,153.75. The plaintiff, replying, admits that the notes were given as part of the purchase price of two Maney

graders; admits the contract including the warranty; denies the breach of warranty and that defendants have been damaged. Upon the trial before a jury, the plaintiff introduced the notes in evidence and rested. The defendants introduced evidence on the issues of breach of warranty and damages. At the close, plaintiff moved for a directed verdict, which was properly denied. The jury returned a verdict of $45 in favor of plaintiff. Plaintiff moved for judgment *non obstante veredicto* and, in the alternative, for a new trial. Defendants also moved for a new trial. The court denied these motions and entered judgment for $70, adding $25 as attorney's fee to the verdict of the jury in favor of plaintiff.

Plaintiff assigns that the court erred: (1-2) In overruling objections to questions propounded to witness Hall concerning the value of the two Maney graders as delivered, and in refusing to strike the answers thereto; (3) in overruling plaintiff's motion for a directed verdict; (4) in refusing to give plaintiff's requested instruction No. 3; (5-6) in giving instructions No. 3 and 4; (7) in overruling plaintiff's motion for judgment notwithstanding the verdict, and (8) in overruling plaintiff's alternative motion for a new trial.

Defendants assign that the court erred (1-2) in refusing to allow defendant Hall to testify as to what the market value of the machines would be if they were as warranted, and in striking the testimony as to the market value of the machines as represented; (3-4) in giving instructions Nos. 3 and 4; (5) in denying defendants' motion for new trial, and (6) in giving plaintiff judgment for $70 when the verdict of the jury was for $45.

Without defendants' affirmative defense and cross-complaint, plaintiff would have been entitled to judgment on the notes, with costs and a reasonable attor-

ney's fee fixed by the court, under Rem. Code, § 475. Defendants' affirmative defense and cross-complaint being for breach of warranty and damages and not to rescind, the measure of damages would be the difference between the purchase price and the actual value of the goods when delivered. *Walsh v. Meyer,* 40 Wash. 650, 82 Pac. 938; *Abrahamson v. Cummings,* 65 Wash. 35, 117 Pac. 709; *Mullerleile v. Brandt,* 64 Wash. 280, 116 Pac. 868.

In *Sanderson v. Trump Mfg. Co.,* 180 Ind. 197, 102 N. E. 2, the court said:

"The usual rule is that the measure of damages for a breach of warranty in the sale of machinery is the difference between the value of the machinery delivered and the value of such as would have complied with the warranty, and the contract price is *prima facie* the latter value."

See, also, *Walsh v. Meyer, supra; Street v. Chapman,* 29 Ind. 142; *Booher v. Goldsborough,* 44 Ind. 490; *Hooper v. Story,* 155 N. Y. 171, 49 N. E. 773; *Parker v. Fenwick,* 138 N. C. 209, 50 S. E. 627.

It is a settled rule that the sale price is *prima facie* evidence of the value of a warranted chattel had it possessed the requisite quality. *Vaupel v. Lamply,* 181 Ind. 8, 103 N. E. 796. Any value estimated above the contract price would be speculative unless a similar apparatus is in the market gauged to the same capacity as represented by the warranty.

In *Huyett-Smith Mfg. Co. v. Gray,* 129 N. C. 438, 40 S. E. 178, 57 L. R. A. 193, the court said:

"The defendant thereupon asked the following instruction, which should have been given: 'If the jury find there was no apparatus on the market which had the capacity claimed for that in question, then what its value was would be speculative, and not a fair basis to estimate the damages; and in that case, the measure

of damages would be the difference in value between the apparatus as delivered and the contract price.' "

If the purchase price had been paid in full, the defendants would have been entitled to recover for a breach of warranty the difference between the purchase price and the actual value of the machines at the time of delivery. So here, whichever was the greater, the amount of the notes sued on or the damages for the breach of warranty, if any, a judgment for the difference should be entered in favor of the one entitled thereto. In other words, the damages may be set off against the amount of the notes if less than the notes, or the amount of the notes may be set off against the damages if less than the damages.

Defendants entered into the alleged contract with the county before the plaintiff's sale and warranty was made, and used from five to twelve of the two-wheel graders on the job at irregular periods as necessity required. The two Maney graders were not purchased to do the entire job. Therefore the 25 per cent of the cost of doing the entire job is not the proper measure of damages.

Hall's rejected testimony was merely speculative and, under the rule of recovery herein stated, was properly excluded.

The court's instructions Nos. 3 and 4 are as follows:

"3. This leaves for the consideration of the jury the following features:

"(1) Has the warranty contained in the contract of sale heretofore mentioned been broken by the plaintiff?

"(2) If it has been broken, how much less in value were the machines worth at the date of the sale than in the purchase price of same to the extent of the unpaid balance, namely: $440 and interest as aforesaid?

"(3) The jury may, if they find such breach of warranty existed and that the graders were worth less thereby, counterclaim or set off said amount of said

diminished value against the notes, subject, however, to the following considerations: evidence has been introduced on the part of the defendants that the said machines were worth the sum of $20 each, or $40 for the two machines. Your verdict, therefore, will be in favor of the plaintiff for not less than the sum of $40 and interest from the time of their delivery, and not more than the amount of the two notes, being $440 with interest as already stated.

"(4) The issues as thus narrowed down are comparatively simple. The execution and delivery of the notes is admitted and that they are unpaid. The contract and warranty are admitted and there is nothing therefore for you to consider in that respect. The only matter for your determination is—was the warranty by the plaintiff that 'These machines to be guaranteed to effect a saving of at least 25 per cent over a like number of No. 2 wheelers when operated in accordance with the instructions of the manufacturer and under like conditions' broken by the plaintiff? In other words whether said machines complied with the terms of said warranty, and if the machines did not comply with said warranty, how much less were the machines worth by reason of said failure to comply with the terms of said warranty. As before set forth, the defendants have admitted that the graders purchased were worth $20 each, and therefore your verdict must be in favor of the plaintiff and against the defendants for at least the sum of $40 and interest from the date of their delivery to the defendants. On the other hand, your verdict against the defendants and in the favor of the plaintiff under the instructions of the court, in view of the matters withdrawn from our consideration as stated, cannot exceed the amount of the notes sued on, which are dated May 5th, 1916, and bear interest at 8 per cent, namely $440 with interest and attorneys fees."

From what we have said, it appears clearly that these instructions are erroneous; and in view of the fact that a new trial must be ordered, it becomes unnecessary to discuss other assignments of error, they

being without merit. Costs will abide the final outcome of the case.

Reversed and remanded for new trial.

MOUNT and MACKINTOSH, JJ., concur.

CHADWICK, J., concurs in the result.

[No. 14798. Department One. October 14, 1918.]

JOHN H. ROCHE *et al.*, *Respondents*, v. JOHN MADAR *et al.*, *Appellants*.[1]

ATTORNEY AND CLIENT (35, 44)—COMPENSATION—EMPLOYMENT—EVIDENCE—SUFFICIENCY. A reinstatement or reemployment of attorneys is sufficiently shown by evidence of the attorneys to that effect, corroborated by disinterested witnesses and the records, as against the testimony alone of one of the parties.

SAME (38) — COMPENSATION — VALUE OF SERVICES. Services of attorneys are not inconsequential and trivial, where pleadings were filed, the causes extensively briefed, and defaults set aside, requiring several trips to another state.

PLEADING (183)—VARIANCE—EXTENT IN ACTION ON CONTRACT. In an action for services by attorneys under a complaint alleging the employment and performance until wrongfully discharged, it is not a fatal variance to prove the employment, a voluntary withdrawal, and a subsequent reemployment and performance thereunder until wrongfully discharged.

SPECIFIC PERFORMANCE (2)—MUTUALITY OF REMEDIES — EXECUTED CONTRACT. Specific performance of a contract employing attorneys agreeing to pay by transferring corporate stock cannot be denied on the ground of want of mutuality of remedies, or right to specific performance against the attorneys, where the contract had been fully performed upon their part.

SAME (1)—EXISTENCE OF OTHER REMEDY. A contract employing attorneys for a specific fee—a certain number of shares of corporate stock—may be specifically enforced, without relegating the attorneys to their remedy in damages.

SAME (37) — PROCEEDINGS — TIME TO SUE AND LACHES. Laches, short of the statute of limitations, will not bar an action for specific

[1]Reported in 175 Pac. 314; 180 Pac. —.

performance, in the absence of any special reason why a shorter period should be enforced.

HUSBAND AND WIFE (61)—COMMUNITY PROPERTY—CONTRACTS BY HUSBAND. Where shares of corporate stock were community property, they were the proper subject of contract by the husband, contracting on behalf of the community in the employment of attorneys.

CHADWICK, C. J., dissenting.

Appeal from a judgment of the superior court for Spokane county, Oswald, J., entered January 2, 1918, upon findings in favor of the plaintiffs, in an action on contract, tried to the court. Affirmed.

Allen, Winston & Allen and *B. B. Adams,* for appellants.

F. C. Highsmith, John H. Roche, and *F. W. Girand,* for respondents.

FULLERTON, J.—On September 13, 1911, the appellants employed the respondents, who are attorneys at law, to represent them and prosecute to a final determination certain actions then pending in the courts of the state of Idaho, in which the appellants were actual parties or parties in interest. The contract of employment was in writing and distinctly specified the services to be performed. As a consideration for the services, it was agreed that the appellants should turn over to the respondents, on the final determination of the actions, 125,000 shares of the capital stock of the corporation, and cause the shares to be transferred to the respondents on the books of the corporation. The respondents immediately entered upon the performance of the services and continued therein for a considerable time, when a difficulty arose between the respondent Roche and the appellant John Madar, causing Roche to write a letter declining to continue longer in the employment. This difficulty, according to the contention of the respondents and their witnesses, although dis-

puted by the other side, was afterwards adjusted, and Roche continued to perform services until both counsel were finally discharged by John Madar, acting on behalf of himself and the other appellants. The causes referred to in the written contract were conducted by other counsel and brought to a final determination.

The present action was brought by respondents to recover the stock and cause its transfer on the books of the corporation. The trial resulted in a judgment in favor of the respondents, and it is from this judgment that the present appeal is prosecuted.

The appellants first assign error upon the findings of fact. It is contended that there was no reemployment or reinstatement of the contract after Roche had announced his intention to withdraw from the employment. But without entering upon an extended review of the evidence, we think it convincing upon the question. The fact was not only testified to by both of the respondents, but they are corroborated by disinterested witnesses who testify to services performed by them in the causes after the letter of withdrawal was written. On the other side, the testimony is practically that of John Madar alone, and he is contradicted in certain particulars by certified copies of the records taken from the causes in the Idaho courts. Again, it is said in this connection that the services performed were inconsequential and trivial. But, to the contrary, we think the showing is that the services were consequential and valuable. Not only were pleadings prepared and filed and the causes extensively briefed, but, when the employment was entered upon, the appellants were in default in certain of the actions, which the respondents were able to have set aside, the work of so doing requiring several trips from the attorneys' place of residence in this state to the courts in Idaho, where the causes were pending.

The second contention is that there is a fatal variance between the pleadings and the proofs. In their complaint, the respondents alleged the contract of hire, their entering upon the duties of the employment, and their continuance therein until their wrongful discharge by the appellants. The proofs were, as has been indicated, a withdrawal by one of counsel, his subsequent reemployment under the same contract, and the subsequent wrongful discharge of both counsel. This, we are clear, is not a fatal variance, nor proof of a different contract from that alleged in the complaint. The terms of the contract remained the same. If there was at any time a severance of the original relation, there was also a resumption of that relation, and the rights and liabilities of the parties remained after the resumption as they were originally. It was competent, therefore, for the respondents to declare upon the original contract, and they are not to be nonsuited, conceding that their proofs show an intermediate break and renewal of the contract.

The case of *Baxter v. Billings,* 83 Fed. 790, cited and relied upon by the appellants, presents, in our opinion, an entirely different question. In that case a contract was made with two attorneys, for a stipulated compensation, to conduct certain litigation. Before the contract was completed, one of the attorneys died, and it was held that the other could not recover upon the contract. While we think the case sound, it does not present the question presented here. There the death of one of the attorneys put an end to the contract, and there was, and could be, no revival of the original contract. Of necessity there must be a new contract, either express or implied, and the court could well hold that any action to recover fees by the surviving attorney must be based upon the new contract. But here no such condition exists. It was competent for the

parties to reinstate the contract, and having done so, it was obligatory upon all the parties.

The third contention is that there is no mutuality of remedies. If we have correctly gathered the appellants' meaning, it is that, since in an action for specific performance they could not have compelled the respondents to perform the services agreed on their part to be performed, the respondents cannot, notwithstanding an actual performance on their part, enforce a specific delivery of the shares of stock. But as we understand the doctrine of mutuality of remedies, it applies only where the contract is executory, not to a contract which has been fully performed on one side and nothing remains to be done on the other but turn over the agreed compensation for the performance. This last is the situation here. The respondents have fully performed or, what is the same thing, performed all that was required or contemplated by their contract until it was breached by the other side. In other words, the compensation agreed upon has been earned, and the question is not, was there originally a lack of mutuality of remedy, but rather, can the appellants urge this original lack of mutuality as a defense to performance on their part, after the contract has been performed by the other party? We are clear they cannot.

The fourth contention is that the remedy of the respondents is one for money damages and not a specific performance of the agreement to deliver the shares of stock. It is a general rule, it is true, that contracts for the sale of personal property will not ordinarily be enforced specifically, and that the general rule is as applicable to the sale of shares of stock as it is to other forms of personal property. But it cannot be said that this is an ordinary contract for the sale of shares of stock. It was a specific fee agreed upon between liti-

gants and their attorneys. In this state it is expressly provided by statute, Rem. Code, § 474, that the "measure and mode of compensation of attorneys and counselors shall be left to the agreement, express or implied, of the parties . . ." and when a particular mode of compensation is agreed upon, we know of no reason why it may not be enforced, and why the attorney may not in any instance resort to that legal method necessary to its enforcement; provided, of course, the contract is fair and aboveboard, and not the result of fraud or inequity such as will avoid contracts made between attorneys and prospective clients generally.

The fifth contention is that the respondents were guilty of laches in instituting their action. But we cannot think this contention requires an extended discussion. That it was brought well within the period of the statute of limitations is not questioned, and this period will mark the limit of the right to maintain an action, unless some special reason is shown why a shorter period should be enforced. A diligent reading of this record fails to disclose any such special reason.

Lastly, it is contended that the shares of stock contracted to be delivered to the respondents were the separate property of the appellant Mary Madar, and thus not a subject of contract by John Madar for a community obligation. The trial court, however, found that the shares of stock were community property of the contractors, not the separate property of Mrs. Madar. With this finding we agree. Being community property, the shares were a proper subject of contract by John Madar when contracting on behalf of the community.

The judgment is affirmed.

MAIN, C. J., PARKER, MITCHELL, and HOLCOMB, JJ., concur.

ON REHEARING.

[*En Banc.* May 28, 1919.]

PER CURIAM.—Upon a rehearing *En Banc,* a majority of the court still adhere to the opinion heretofore filed herein, and for the reasons there stated, the judgment is affirmed.

CHADWICK, C. J. (dissenting)—While we have not been inclined to apply the doctrine of laches within the period of statutory limitation, we have, in common with other courts, held that the doctrine is peculiarly applicable where mining property is involved.

"The doctrine has been applied in such cases because the character of the property or the manner of its transfer, and all the incidents attending its use and ownership, are circumstances to be considered." *Gray v. Reeves,* 69 Wash. 374, 125 Pac. 162.

It is because mining property is speculative in character and subject to sudden and violent fluctuations in value, and what may be worthless today may become of great worth through the faith and industry of one owner as against a lagging, noncontributing partner.

"Property worth thousands to-day is worth nothing to-morrow; and that which would to-day sell for a thousand dollars as its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious, of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit." *Twin-Lick Oil Co. v. Marbury,* 91 U. S. 587, 592, 593.

See, also, 3 Lindley, Mines (3d ed.), § 782; 18 R. C. L., Title "Mines," § 149, pp. 1253, 1254.

Granting all that respondents claim, I cannot distinguish this case from *Patterson v. Hewitt*, 195 U. S. 309; *Johnston v. Standard Min. Co.*, 148 U. S. 360; *Waterman v. Banks*, 144 U. S. 394; *Steinbeck v. Bon Homme Mining Co.*, 152 Fed. 333; *Jackson v. Jackson*, 175 Fed. 710; *Cunningham v. Independence Consol. Min. Co.*, 58 Wash. 371, 108 Pac. 956; *Ferrell v. Lord*, 43 Wash. 667, 86 Pac. 1060; *Gamble v. Hanchett*, 34 Nev. 351, 432, 126 Pac. 111; *Great Western Min. Co. v. Woodmas of Alston Min. Co.*, 14 Colo. 90, 23 Pac. 908; *Graff v. Portland Town & Mineral Co.*, 12 Colo. App. 106, 54 Pac. 854; *Rogers v. Van Nortwick*, 87 Wis. 414, 58 N. W. 757, and the decision of this court in *Florence-Rae Copper Co. v. Iowa Mining Co.*, 105 Wash. (. . . .), 178 Pac. 462, which was decided after our opinion in the principal case was handed down. And with all due respect to the decision of the court, the cases I have cited are not distinguished, although we were invited to do so by counsel.

There are other grounds which, in my judgment, justify an overruling of our former opinion and a reversal of the case. They are not discussed in the opinion, and the court being disinclined to treat them as worthy of comment, it would avail nothing for me to discuss them. But if respondents are to recover, it would seem to be no more than just to compel a payment *pro tanto* on the cost of proving the mining claim, and because of which respondents now see fit to assert an interest in it. They have eaten their cake and have it, and of this can any man say more?

[No. 14421. Department One. October 15, 1918.]

JOHN H. CARLIN, *Respondent*, v. FRED DRAPER *et al.*, *Appellants*.[1]

APPEAL (1002)—REVIEW—VERDICT. Where a question of fact is presented upon conflicting evidence, a verdict supported by substantial evidence will not be reviewed on appeal.

Appeal from a judgment of the superior court for Stevens county, Jackson, J., entered December 5, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action of replevin. Affirmed.

Rochford & Wilson, for appellants.

W. Lon Johnson, for respondent.

MAIN, C. J.—This is an action in replevin, and was brought for the purpose of recovering the possession of certain lumber. The cause was tried to a jury, and resulted in a verdict that the plaintiff was the owner and entitled to the possession of the lumber. Motion for judgment *non obstante veredicto* and motion for new trial being interposed, both of which were overruled, judgment was entered upon the verdict. From this judgment, the defendants appeal.

The facts necessary to an understanding of the case may be stated as follows: In November, 1914, the respondent sold to John Kendall and J. J. Kendall a sawmill and certain equipment therefor for the sum of $1,650, payable in lumber to be cut and delivered to the respondent at Colville, Washington. At the time of making this contract, John Kendall and wife, to secure the payment of the $1,650, executed and delivered to the respondent a mortgage upon what is referred to as their timber homestead, and particularly described. The sawmill was moved by the Kendalls

[1]Reported in 175 Pac. 571.

and erected upon this land. After so erecting the sawmill, they proceeded to operate the same. The respondent engaged in the logging business and delivered logs to the Kendalls to be sawed into lumber. The mill apparently was operated until about November 26, 1915, when it was closed down, the Kendalls at this time being somewhat embarrassed financially. Soon after the mill closed down, the respondent claims that approximately one hundred thousand feet of lumber then in the yard was sold to him and that he immediately took possession thereof. On December 31, 1915, John Kendall and wife, by a quitclaim deed, conveyed their interest in the land covered by the mortgage to appellants Mrs. Carrie Draper and J. H. Loucks. On the same date, John Kendall, by a bill of sale, transferred to the same parties the sawmill outfit, together with the logs unsawed and the lumber in the yard. This bill of sale covered the one hundred thousand feet of lumber which, as above stated, the respondent claimed to have purchased and taken possession of on November 26, 1915. A dispute arose between the parties as to the ownership of the lumber.

The respondent claimed not only that he had purchased and taken possession of it, but that, at the time the bill of sale was made to Mrs. Draper and J. H. Loucks, they had knowledge that he claimed the lumber. The appellants claim that respondent did not take possession of the lumber, and that they acquired it under their bill of sale and without knowledge or notice of any adverse claim.

There is substantial evidence in the record which, if believed, would support the respondent's position. There is also substantial evidence which, if believed, would support the position of appellants. A question of fact was, therefore, presented upon conflicting evidence, which it was the province of the jury to deter-

mine, and the jury determined the question in favor of the respondent. There being substantial evidence to support the verdict, the question of fact will not be here reviewed. The trial court did not err in declining to grant the motion for judgment notwithstanding the verdict.

There are a number of assignments of error covered by the motion for new trial which relate to the ruling of the trial court upon the acceptance and rejection of evidence and to instructions given. Without reviewing the claimed errors on the reception and rejection of evidence in detail, it may be said that we find in none of them, after careful consideration, any substantial merit.

One of the instructions to which objection is made is what is referred to as No. 4, and it is claimed that this instruction is inconsistent, vague and misleading and assumes a fact as proven which was in issue. We think the instruction is not subject to the criticism directed against it. It is reasonably clear and states the law as favorably to the contention of the appellants as they were entitled to. It could not reasonably be given the interpretation of assuming a fact as proven which was in issue.

The objections to the other instructions covered by the assignments of error are equally without merit. The case was fairly tried, the pivotal question being one of fact, which was submitted to the jury by instructions which were not prejudicial to the appellants.

The judgment will be affirmed.

FULLERTON and PARKER, JJ., concur.

[No. 14634. Department Two. October 15, 1918.]

FRED R. ALEXANDER, *Appellant*, v. ADOLPHUS LEE LEWES *et al., Respondents.*[1]

SPECIFIC PERFORMANCE (25) — CONTRACTS ENFORCIBLE — CONTRACT TO DEVISE. Contracts to devise real estate in consideration of an agreement for life support are personal and will not be specifically enforced beyond the lifetime of the person to whom the promise was made, such person having died before the testator.

WILLS (8)—CONTRACT TO DEVISE—VALIDITY. To agree to make a will is within the realm of contract right and the fairness of the agreement must be determined by resort to the relations of the parties and the attending circumstances, and past favors may be adopted as part of the consideration.

SAME (8-1)—CONTRACTS TO DEVISE—REQUISITES—CONSIDERATION—EVIDENCE—SUFFICIENCY. Specific performance will be decreed of an agreement to devise to a son-in-law property worth $12,000 in consideration of life support for the testator, who was 83 years of age, together with an assignment of the son-in-law's life insurance, where it was supported by evidence of previous benefits received which were acknowledged in the will, and was coupled with the execution of the will and delivery of a contract for support, without undue influence.

SPECIFIC PERFORMANCE (25)—CONTRACTS TO DEVISE. Inadequacy of consideration is not a sufficient objection to specific performance of a contract to devise lands to a son-in-law for life support, since the testator may, in the absence of fraud, fix upon any lawful consideration sounding in personal service.

EVIDENCE (157)—PAROL EVIDENCE—CONSIDERATION. It is competent to prove by parol that a will was executed in consideration of a written agreement for life support, although the papers did not refer one to the other.

WILLS (8-1)—CONTRACTS TO DEVISE—SUBSTANTIAL PERFORMANCE. It cannot be objected that there was no substantial performance of an agreement for life support in consideration of a contract to devise lands, from the fact that, four days after making the will, the testator voluntarily left and attempted to repudiate the agreement and revoke the will, and shortly after died, where the devisee was in no way responsible for testator's breach of the agreement.

[1]Reported in 175 Pac. 572.

SAME (8-1)—CONTRACTS TO DEVISE—INCIDENTAL RELIEF. In an action to enforce specific performance of a contract to devise lands, heirs to whom the testator devised it cannot be charged with the payment of a mortgage subsequently placed on the land by the testator.

Appeal from a judgment of the superior court for Cowlitz county, Darch, J., entered June 6, 1917, upon findings in favor of the defendants, dismissing an action for specific performance, tried to the court. Reversed.

Clarence H. Gilbert and *H. W. Arnold,* for appellant.

Magill & McKenney, for respondents.

CHADWICK, J.—This is a suit to enforce specific performance of a contract to devise real property.

Frederick Lee Lewes, then of the age of 74 years, went to live with appellant and his wife, formerly Georgia Lee Lewes, a daughter of Frederick Lee Lewes, in the year 1901, and continued to reside with appellant as a member of his family until August 30, 1913.

At that time, and at the time of the death of Frederick Lee Lewes, he owned three pieces of land in Cowlitz county, Washington, a donation land claim containing 237.56 acres, a place known as "The Homestead," containing 160 acres, and a place known as "Mother's Claim," containing 120 acres. Georgia Lee Lewes Alexander died August 14, 1913; Frederick Lee Lewes died in August, 1915. He was the father of seven children, of whom four, the respondents in this case, survive him.

Appellant alleges in his complaint that there was an understanding between Frederick Lee Lewes and his wife and himself in 1901 that Frederick Lee Lewes should make his home with his daughter and be cared

for by them during his natural lifetime, and in consequence of this service Frederick Lee Lewes would leave to them the south half of the place known as "Donation Land Claim." Without reviewing the testimony offered to sustain this claim, we think the court rightfully held that the contract, if any, is not now capable of specific performance. The daughter, Georgia Alexander, having died before her father, and the rule being that contracts of the kind relied on are personal, specific performance will not be decreed beyond the lifetime of the party to whom the promise is made.

Appellant sets up a second cause of action growing out of the following state of facts. Upon the death of the daughter, Georgia Lee Lewes Alexander, Frederick Lee Lewes, then a member of the household of appellant, being desirous of continuing to make his home with appellant, went with him to the office of an attorney at law and there directed (appellant not being present in the room) that the attorney draw his will. The will provides:

"I give, devise and bequeath to my beloved son-in-law, Fred R. Alexander, the husband of my beloved daughter, Georgia Claudine Lee Alexander, now deceased, and to whom I am greatly indebted for extreme kindness, care and attention, and to whom, as a recognition of this kindness and care to me, I hereby place in the same position as regards my estate as I would place my said deceased daughter had she lived and survived me, to my son, Frederick Archie Lee Lewes, what is known as the donation land claim of my deceased brother, Adolphus Lee Lewes, and designated as Claim No. 38, being part of Section 30, in Township 5, North of Range 1 East of the Willamette Meridian, and Claim No. 50 being parts of sections 24 and 25 in Township 5, North of Range 1 West of the Willamette Meridian, all in Cowlitz county, state of Washington, according to the official plat of survey, and containing 278 acres of land, more or less, the

same to be divided into two equal parts by a line running due east and west; my said son-in-law, Fred R. Alexander, to have the southern portion of the land so divided and my son, Frederick Archie Lee Lewes, to have the northern portion of said land."

Mr. Lewes expressed his cordial feeling toward appellant and a desire to recompense him for past favors as well as like favors to follow in the future.

Appellant, who had, during the time the will was being prepared, been engaged upon some errand, having returned to the outer office, was called into the room with the attorney and Mr. Lewes and, according to the testimony of the attorney,

"When he had executed the will he said 'I am satisfied with that, it is just the way I wanted it,' and when Alexander was called into the room he said what I have repeated before, told him that—what he had done, or what Alexander had done for him, given him a good home, provided for his wants, and he was perfectly satisfied with his treatment, and that he wanted to remain, wanted him to keep him in his home the remainder of his life, and he spoke it with a great deal of feeling; sometimes put it with tears in his voice. . . . Just before they departed from the office Mr. Lee Lewes stepped up to Mr. Alexander, and put his hand—one hand at least, or both hands, on his shoulder, and spoke about the home that they had given him, and the number of years that he had lived with them, or practically or substantially so, and that he had been a real son to him, and he wanted to continue to live with him as long as he lived. That is in substance the remark he made; he didn't want him to turn him out, he wanted him to keep him—furnish him a home. The old gentleman was very sincere, apparently, about it, and somewhat affected in his tone of voice and in his manner."

At the same time and as part of the same transaction, the attorney prepared a contract providing for the

future maintenance of a home for the said Frederick Lee Lewes, as follows:

"Know all men by these presents, That I, Fred R. Alexander, for and in consideration of one dollar, love and affection, and other valuable considerations to me paid by Frederick Lee Lewes, my father-in-law, do hereby promise, covenant and agree to and with Frederick Lee Lewes, who is now about 83 years old, that I will provide and maintain a home for him with me during the remainder of his natural life, and to take care of him in health and in sickness, and during any infirmities of old age, it being my purpose and intention to the best of my ability so to do, to maintain a home for him as good and comfortable to him as that given and maintained by his daughter, and my wife, Georgia Claudine Alexander, lately deceased, and I further hereby agree, to make him, Frederick Lee Lewes, beneficiary in my one thousand dollar life insurance policy in the Knights and Ladies of Security, in place of my deceased wife, so that he may receive and enjoy the proceeds of such policy in case he survives me.

"In witness whereof I hereunto set my hand and seal this 26th day of August, 1913.

"Witness, G. W. Allen. Fred R. Alexander."

Mr. Lewes took possession of the contract. Four days after the execution of this will and contract, Mr. Lewes left the home of his son-in-law and took up his residence with the respondent, Adolphus Lee Lewes. No reason was assigned, nor did appellant know of his going until he had moved away. Appellant testified that he told Adolphus Lee Lewes and a Mrs. Huff, the housekeeper, of the will. This is denied by Adolphus, who insists that the old man came to him voluntarily and under the coercion of no persuasion or duress whatever. But it seems quite certain that respondents knew of the will at the time the deeds hereinafter mentioned were executed. Within a day or two thereafter, Frederick Lee Lewes went to the lawyer, saying that

he wanted to change his will; that he had left Alexander's home; that he had moved in order to keep peace in the family; and that it did not look well for him to live out of the family. The attorney says that Mr. Lewes told him not to tell the boys and not to tell appellant that he had changed his will. A few days before his death, he made deeds conveying all his property to respondents.

The court below denied specific performance upon the second cause of action.

Perhaps the fairest way to state the case of respondent is to quote the views of the lower court as we find them quoted in the briefs:

"Now let us see what rights he had under the second alleged contract:

"Here we have an old man past his eighty-fifth year, whose life expectancy is only two and 77-100 years, agreeing to convey to his son-in-law property of the value of twelve thousand ($12,000) dollars to take care of him in all probability not to exceed two and a half years. An old man who was not estranged from his own children; an old man who had plenty of means to take care of himself and whose children were able and willing to take care of him, and who, three days after making the contract, leaves the home of his son-in-law, for what reason none of us know (as his lips are now silent in death), goes to his son's home and tells him to take to Alexander the contract signed by Alexander, telling him that he did not want it any more. And in face of all this we have Alexander coming and saying that he is entitled to this $12,000 worth of property. Any rights that he might have must be based entirely upon this last contract. Nothing remains of the first contract which would entitle him to a specific performance, he having waived it, if such a contract had ever been made. This contract was also made within a very short time after the death of his daughter, and in all probability the old gentleman's feelings were worked up to that pitch in his dotage, which leaves a question as to whether or not he was really responsible for his

acts. The plaintiff claims that the will recited as a part consideration the treatment that he had received from Alexander and his wife before. I do not take that statement to mean that which the plaintiff intends for it, but rather that it is an acknowledgment merely of a kindness received by the old gentleman from Alexander, and there is no question but that, when Alexander's wife was living, that the old gentleman received the best of treatment at the hands of Alexander and his wife. But that statement in the will was merely an acknowledgment of the kindness, as any of us in speaking of the kindness that we might have received from another party.

"Any services that Alexander rendered the old gentleman after the death of his wife is easily measured in money value. In fact, any services that have been rendered at all while the old gentleman was living with him could be measured by a money value, but there being no first contract in the estimation of the court, it seems that at least the last contract services rendered could be readily compensated him by cash.

"Specific performance should not be enforced if it would be unconscionable or inequitable or work a hardship or injustice. To say to Alexander that he is now entitled to the twelve thousand ($12,000) dollars, by reason of taking care of the old man three or four days after the old man repudiated the contract, for what reason, as I said before, we do not know, it seems to me would be an entire injustice, as an act for this court to recommend.

"I feel that plaintiff's case should be dismissed with costs."

It will thus be seen that the relief was denied upon the grounds generally of the inequity of appellant's claim, in that too much would be granted for too little in return; that the value of the property would be disproportionate to any service that could be rendered in the brief expectancy of life remaining to Frederick Lee Lewes; that the former contract and service, if any, were waived by conduct or overcome by the exe-

cution of the subsequent writings; that the will is not a contract, but a mere acknowledgment of former kindnesses; and finally, if the will and agreement be treated as a contract, it will not be enforced because the value of the services rendered can be readily ascertained in money, and the remedy is in *quantum meruit* and not in equity for specific performance, to which counsel add as a further reason for denying a recovery that the contract as distinguished from the will was unilateral and not signed by the testator, and being of no binding effect upon him, would not support a promise to make a will.

Cases of this kind are not favored, and when the promise rests in parol are even regarded with suspicion, and will not be enforced except upon the strongest evidence that it was founded upon a valuable consideration and deliberately entered into by the deceased. Waterman, Specific Performance, § 41.

But while not favored and rarely enforced upon oral proofs, the power to make a valid agreement to dispose of property by will in a particular way has long been recognized. "But," said the court in *Rivers v. Rivers,* 3 Desaus. Eq. (S. C.) 190, 4 Am. Dec. 609, after citing a number of very early English cases, "I should feel no hesitation to decide this point on principle," for, as the opinion declares,

"It appears to me that to make a will in a particular way, on proper considerations, is as much a subject of contract as any other; and he who makes a contract on this subject, is as much bound thereby as he would be by any agreement on any other subject. To be sure the court would be more strict in examining into the nature and circumstances of such agreements than any others, and would require very satisfactory proofs of the fairness and justness of the transaction. I conclude, therefore, that the party had a right to bind himself to make his will in a particular way by an

agreement, and the court has the power to enforce the agreement."

So,

"An agreement by which a person obligates himself, for a valuable consideration, to devise or bequeath property to the other contracting party is in *no respect contrary to principles of public policy.* The specific performance of such a contract will be granted in equity against the personal representatives of the promisor; for courts of equity have, from time immemorial, possessed jurisdiction in such a case to carry out the intention of the parties and to afford a remedy where the remedy at law is clearly inadequate. Equity will not make a will to take the place of that which has not been made. But, acting upon well-recognized principles, the court of equity will fasten a trust upon the estate of the promisor in favor of the promisee which will attach to that estate in the hands of his heirs, executor, next of kin or other persons, and which will be enforcible against them. In such a condition of affairs a court of equity will compel the legal owner of the property, who takes by descent or devolution from the promisor, to execute a conveyance of the property to the promisee.

"And where the promisor, after entering into a valid contract to devise the property, conveys it to third parties without consideration, a court of equity will, upon the death of the promisor, decree that the conveyance shall be set aside as against the party with whom he has contracted to devise it." 1 Underhill on the Law of Wills, 387.

See, also, Ramsen, Preparation and Contest of Wills, § 9; Rood, Wills, § 54 *et seq.;* Fry, Specific Performance of Contracts (3d ed.), 223.

The remedy in this class of cases depends upon the facts of each particular case and will require full and satisfactory proof of the fairness and justness of the transaction. In this state it has been held that an oral contract to make a will is obnoxious to our statute of

frauds unless the testator in his lifetime has done some substantial thing in pursuance of the contract. In *Swash v. Sharpstein,* 14 Wash. 426, 44 Pac. 862, 32 L. R. A. 796, we are advised that the acts of the parties must be such as to place the contract beyond all legitimate controversy. The proofs required, whether the contract rests in parol or is evidenced by a writing, go not so much to the terms of the contract as to the intent of the testator, for whatever the terms, there can be no devise, either actual or by construction of equity, if there is no intent. And such intent is to be measured as of the time the contract is entered into, and so its fairness and justness must be determined by resort to the relations of the parties, their relations to each other, and the circumstances attending at the time the contract was made.

To devise by will is one of the highest privileges of property, and to agree to make a will in consideration of past or future benefits is well within the realm of contract right.

In the case at bar, the court rejected, and as we think properly, the first cause of action, but it does not follow that we are to reject the narrative of the years that followed the year 1901 as a field for inquiry as to intent of the testator and the relations of the parties, the testator and this plaintiff. That the parties had lived as one household in mutual trust and confidence has been clearly proven. It is in no way denied. That the affection of Frederick Lee Lewes for his deceased daughter and his abiding intent that she should have a portion of his property should find expression in a desire to give the equivalent of what would have gone to her by will or by inheritance, or to her issue, if she had left a child, to her surviving husband, who had been the head of the household and who had not only borne the attitude of a dutiful son, but had made some busi-

ness sacrifices, and at least one change of location, that he might maintain a home for the more comfortable maintenance of the testator, is most probable. When coupled with the actual writing of a will it seems most convincing.

"Here, then, is a writing that may serve to help to prove the contract. The case is such, therefore, that it is not left wholly at the mercy of parol evidence. True, this writing was void, as a will, but that did not prevent it from being good, to help to prove the contract." *Maddox v. Rowe,* 23 Ga. 431, 68 Am. Dec. 535.

Counsel for respondents deny all legal effect to the relations of the parties prior to the time the will was executed, for, as they rightly contend, no action could have been maintained upon the first contract, if any, to make a will in favor of the wife of appellant. But although a court of equity would, in the absence of other controlling facts, give no ear to appellant's plea of consideration for past favors, it will not deny the right of the motive to recognize past favors and to adopt them as part, if not a sufficient, consideration for a promise to convey in the future by deed or to devise by will.

In other words, in the absence of fraud or overreaching, the testator, being competent, can fix upon anything that is not in itself unlawful as a consideration and put his own value upon it, whether it be greater or less. This is so in this class of cases even in greater degree than in ordinary cases, for the courts have rarely if ever undertaken to fix the value of a consideration sounding in personal service. They have recognized the futility, if not the impossibility, of measuring in dollars and cents love, affection, care, service and attention to the aged or infirm.

"There is no reason in law or equity why the adequacy of that consideration should be here inquired

into. It was a consideration, without any fraud or undue influence, fixed by the Hills of their own free will." *Keagle v. Pessell,* 91 Mich. 618, 52 N. W. 58.

Many cases hold that "A moral obligation founded on previous benefits received by the promisor at the hands of the promisee will support a promise by him." These cases are collected in 9 Cyc. 391.

As a part of his first cause of action, appellant set up that, by the terms of what he claims to have been the original contract, Frederick Lee Lewes was to pay ten or fifteen dollars a month to his daughter, and he testified that Mr. Lewes had made slight payment from time to time. It is also in evidence that the old gentleman did some chores about the house; he put in the wood and milked the cow. These circumstances are seized upon to rebut the weight of what might otherwise have been a moral obligation. But we attach no importance to these circumstances. Mr. Lewes had a slight income from his property, and this he gave to his children in small amounts, respondents, as well as to his daughter now deceased. Moreover, it may have been within his mind that fair dealing demanded that he pay something in money from time to time, for it is in evidence that the family was subject to frequent and sometimes long protracted visits from other children or grandchildren.

In this connection it is also insisted that Archie Lee Lewes was a member of the household, and that, after deducting the amounts paid by the father, the balance of the cost of maintaining the home was divided between appellant and Archie Lee Lewes. If the case depended upon the first cause of action, it may be that these circumstances would have sufficient weight to overcome a plea for specific performance, but to give them the legal effect now claimed for them by respondents would be to deny to Frederick

Lee Lewes the right to contract with reference to his own affairs. We must assume, in the light of subsequent events, that Frederick Lee Lewes considered these matters and found them wanting of the quality now claimed for them by respondents. If he gave them any consideration, the law must now presume that he waived them as matters of consideration for the contract evidenced by the will and agreement.

It is not for us to make contracts for competent parties, nor is it for respondents to repudiate the contracts of others because of equities before which the bar of a valid contract has fallen. It would be unseemly, to say the least, for us to hold the contract inequitable as it affects these respondents, when Frederick Lee Lewes found no inequity in his promise.

But if this doctrine be doubtful if standing alone, the agreement of appellant to maintain a home for Frederick Lee Lewes during his lifetime is, when coupled with the recognition in the will of the value of past services, ample to sustain the promise to devise the land. Unless, as respondents contend, the will and the agreement cannot be construed together as writings going to the same transaction; and further, that the agreement is (a) a voluntary unilateral contract on the part of appellant, not being signed by Frederick Lee Lewes; (b) that there was no substantial compliance, and (c) that there has been no substantial compliance in that appellant never made over the insurance certificate as he had agreed.

That the will and the agreement go to the one transaction can hardly be denied. It is true that they do not refer the one to the other, but since the connecting link lies in the consideration, and since it is always competent to prove a consideration, it was competent to prove that the one paper was signed in consideration of the other. It is not necessary that cotemporaneous

papers or writings should refer one to the other. It is enough if they relate one to the other and all go to the same transaction. 6 R. C. L. 640.

In *Bird v. Pope,* 73 Mich. 483, 41 N. W. 514, a similar contract was evidenced by a will and a collateral agreement. The will and the contract did not tie, but the court rejected the theory that the instruments had to be complete in themselves. It was not provided where Pope should be maintained, and there were other conditions with reference to working and living upon the land, of making improvements thereon, and possession, all resting in parol. In ruling that all of these matters might be proved by oral testimony, the court said:

"Not only was it a part of the transaction, a portion of which was embodied in the making of the will and in the contract, but it did not tend in any way to contradict, vary, or alter these instruments or their meaning."

In *Logan v. Wienholt,* 7 Bligh 1, H. L., the promisor made a bond conditioned that he would, in consideration of the marriage of the niece, "either by last will or testament give and bequeath, or by some other means give unto, or in trust" for his niece, money or valuable effects. The promisor left a will, but failed to perform the condition of his bond. The Lords granted a specific performance upon the bond, saying:

"The rights of the parties arise under the bond considered as an agreement, binding the parties: and next, that the intent of the testator by his will, and in the disposition of his property, and, I may add, the various conveyances, and assignments, and transfers, in which he dealt with his property through its various channels, and in its various kinds, and the acts which he so did, are only to be suffered to affect the property so far as they are not repugnant to the agreement, and do not go against the rights given by that agreement, and to be only so far valid as between him and the parties

in whose favour those acts were done or attempted to be done as they did not defraud or contravene that agreement." 7 Bligh, p. 50.

Neither was it necessary that the agreement for support be signed by the promisor. He had given effect to his promise by executing his will and confirmed it by accepting delivery of the contract for support. This made a contract as effectually as if the agreement had been accepted by written signature. *Wright v. Suydam,* 72 Wash. 587, 131 Pac. 239; *Amherst Inv. Co. v. Meacham,* 69 Wash. 284, 124 Pac. 682.

On the issue that there was no substantial compliance, either in time or performance, our holding that the contract as evidenced by the will and the agreement is sustained, in part at least, by past favors is a sufficient answer. Courts will not ordinarily measure equities by time standards to aid one who breaks a contract or those who claim under him.

The test of performance lies not so much in acts of performance as in the mutuality of the contract. Frederick Lee Lewes, being in the full possession of his faculties and presumably knowing his own desires, voluntarily entered into the contract. As it happened, he voluntarily broke it. If, on the other hand, appellant had refused to perform his part of the contract—refused to keep and maintain a home for Mr. Lewes—we have no doubt that he could have been compelled to abide his contract or be made to answer in damages for its breach, or that a court of equity would have relieved the promisor of his obligation to perform.

To say that appellant should have no relief because he has not substantially performed would be to bind him by a circumstance for which he was in no way responsible, to the exclusion of all other circumstances, one of which is paramount and the creation of the

promisor; that is, the breaking of the contract by the promisor himself. We have then, or may grant, a nonperformance except for four days, but a willingness to perform on the part of the appellant and a voluntary breach of his contract by the promisor. When considered in its entirety and not upon the isolated fact that no great length of time passed, or there was only slight performance between the execution of the papers and the departure of Mr. Lewes from the home of appellant, it is plain that he cannot be charged with nonperformance, for no one can deny that Mr. Lewes, by his own renunciation, put it beyond his power to render a more substantial compliance.

There is nothing mysterious or mystifying about contracts to devise by will. They are valid and will be enforced as other contracts, and where the promisor has repudiated his contract, and although such a contract is not broken until death so as to support a cause of action, one court at least has gone so far as to hold that a bill *quia timet* is available to fix the legal status of property where the promisor has repudiated his contract during his lifetime and has attempted to make other disposition of his property. *Duvale v. Duvale,* 54 N. J. Eq. 581, 35 Atl. 750.

The case ordinarily presented is one where the promisee fails to perform. The question of substantial performance is then important. But this case rests not upon the failure of the promisee, but upon the repudiation of his contract by the promisor.

In *Bird v. Pope, supra,* there had been part performance when the contract was broken by the promisor. The court held that a willingness to perform, the contract being broken, would have been sufficient to sustain the action; that a party might lose the advantage of his contract by his own wrongful acts, but that the

promisor was powerless to convey the premises away from him so long as he was performing, or was willing to perform his contract to the end. In that case, as in this, the contract was dictated by the promisor without the intervention of the promisee.

Reduced to its lowest terms, we have a contract to devise land by will evidenced by two cotemporaneous writings, one of which is a will executed for the purpose of carrying out the contract, followed by an attempted revocation of the will. Where wills are voluntarily executed the power to revocate is absolute, but,

"The general rule under which the revocable character of wills is universally admitted to exist is subject to a seeming exception, where the execution of the will is a part of a contract to make a will, and the person in whose favor the devise was made has gone into possession and made expenditures upon faith in the contract. Perhaps it is hardly correct to claim that the will is irrevocable. While the testator may destroy the will or execute another revoking it, the contract itself cannot be rescinded, and will be enforced by the court in favor of the person who has acted upon it." Underhill, Wills, § 289.

That one who is willing to act upon the contract but who is prevented by the voluntary repudiation of the other party is in the same legal position as one who has substantially complied before repudiation goes without saying. It is no more than the statement of a corollary.

It is true that no testimony was offered to sustain the allegation of the complaint that a transfer of the insurance certificate had been made, but such omission would not alter the rights and obligations of the parties to this action. The object of the transfer was to give Frederick Lee Lewes the benefit of the policy in case he should survive appellant. The undertaking was per-

sonal to Frederick Lee Lewes, and, he having died, it is not now material.

Mindful of the rule that, in all cases brought to enforce a contract to devise land, we must look to the facts of the particular case and follow the equities arising out of them, we have made little reference to the many authorities cited by counsel. We have examined them, but find in them no more than an application of the general principles stated in the text books, to which reference may be the more conveniently made.

Appellant has prayed for a decree directing that respondents pay, or cause to be satisfied, a certain mortgage for the sum of five hundred dollars which was placed upon the property by Frederick Lee Lewes after the execution of the will. Respondents are not personally liable for this incumbrance and we are without power to charge them with its payment.

Reversed, and remanded with directions to enter a decree granting the prayer of appellant's complaint, excepting in so far as herein indicated.

MAIN, C. J., MOUNT, HOLCOMB, and MACKINTOSH, JJ., concur.

[No. 14739. Department One. October 15, 1918.]

UNION TRUST COMPANY, *Appellant*, v. L. H. MOORE, *as State Bank Examiner, et al., Respondents.*[1]

CORPORATIONS (23)—CORPORATE NAME—RIGHT TO USE—"TRUST" COMPANY—STATUTES—CONSTRUCTION. A corporation the articles of which authorized it to engage in a trust business, cannot lawfully use the word "trust" in its corporate name, although it does not actually engage in a trust business, without complying with Laws 1917, ch. 80, p. 271, which defines what constitutes a banking or trust business, provides for the incorporation of banks and trust companies and for their supervision, imposes penalties not applicable to other corporations, and provides that no corporation shall engage in a trust business except as authorized by the act and that no corporation shall use the word "trust" in its corporate name except a corporation authorized by the laws of the state; since the act was intended to put banks and trust companies in a distinct class with limited powers and new safeguards.

SAME (23). The words "Trust Company" in such act are not ambiguous, and the phrase "authorized by laws of the state," was merely intended to differentiate between trust companies organized under the act and foreign trust companies authorized by the act to engage in a trust business, and not to authorize existing companies to continue the use of the trust name, if not engaged in a trust business without complying with the law.

CONSTITUTIONAL LAW (126)—DUE PROCESS—DEPRIVATION OF PROPERTY—CORPORATE NAME. Laws 1917, p. 271, prohibiting the use of the word "trust" in the corporate name of a company not incorporated as a trust company, is not a taking of property without due process, as to existing corporations, in view of Const., art. 12, § 1, which provides that laws relating to corporations may be altered, amended or repealed at any time, and that corporations doing business in the state may be regulated, limited or restrained by law.

Appeal from a judgment of the superior court for Thurston county, Wright, J., entered December 8, 1917, in favor of the defendants, dismissing an action for an injunction, after a trial on the merits before the court. Affirmed.

[1]Reported in 175 Pac. 565.

Turner & Hartge, for appellant, contended, *inter alia,* that an unreasonable or oppressive interpretation of a statute or one operating to create injustice, should be avoided if possible. 36 Cyc. 1111, 1112; Endlich, Interpretation of Statutes (Ed. 1888), § 245 *et seq.*; Sutherland, Statutory Construction (Ed. 1891), §§ 321, 322; *Dennis v. Moses,* 18 Wash. 537, 52 Pac. 333; *State ex rel. Chamberlain v. Daniel,* 17 Wash. 111, 40 Pac. 302, 49 Pac. 243.

Where a retroactive construction would cause injustice it should be avoided if possible. Endlich, Interpretation of Statutes (Ed. 1888), § 271; *Hale v. Stenger,* 22 Wash. 516, 61 Pac. 156.

The reservation of the right to repeal and amend corporation laws does not include the right to amend and repeal charters granted under those laws prior to such repeal or amendment. *Lord v. Equitable Life Assur. Soc. of United States,* 47 Misc. Rep. 187, 94 N. Y. Supp. 65; *People v. O'Brien,* 111 N. Y. 1, 18 N. E. 692, 7 Am. St. 684, 2 L. R. A. 255, 262, 263.

In the absence of a specific provision making such an intention clear the repeal or amendment of a general incorporation law does not repeal or amend the charter. Opinion Attorney General, 1911-1912, p. 257, and cases there cited; 1 Thompson, Corporations, p. 351; 2 Clark and Marshall, Private Corporations, p. 835; 1 Clark and Marshall, Private Corporations, pp. 715-717; 2 Cook, Corporations, p. 1038; *Donworth & Behan v. Coolbaugh,* 5 Clarke (5 Iowa) 300; *City of Lansing v. Michigan Power Co.,* 183 Mich. 400, 150 N. W. 250; *New York & N. E. R. Co. v. Town of Bristol,* 151 U. S. 556.

The name of a corporation is a vital essential of its charter, and a change of its name is in effect a creation of a new corporation. *State ex rel. Osborne, Tremper & Co. v. Nichols,* 38 Wash. 309, 80 Pac. 462.

The Attorney General, and *Glenn J. Fairbrook, Assistant,* for respondents, cited: *Buffalo & N. Y. City R. Co. v. Dudley,* 14 N. Y. 336; *New York & N. E. R. Co. v. Town of Bristol,* 151 U. S. 556; *St. John v. Iowa Business Men's Building & Loan Ass'n,* 136 Iowa 448, 113 N. W. 863, 15 L. R. A. (N. S.) 503; *Berea College v. Commonwealth of Kentucky,* 211 U. S. 45; *McKee v. Chautauqua Assembly,* 124 Fed. 808.

FULLERTON, J.—The appellant, Union Trust Company, was organized as a corporation under the laws of this state in the year 1892, with its principal place of business in the city of Seattle. Its articles of incorporation authorize it to engage in a variety of businesses, including, among others, the trust business and the business of buying, selling, leasing and otherwise dealing in real estate. Up to the time of the commencement of this action, its business has been confined to dealing in real estate; at no time has it sought to exercise its powers as a trust company. In its chosen line, however, its business has been and is extensive, and its corporate rights, name and good will are valuable. In 1917, the legislature passed an act relating to banks and trust companies. Laws 1917, ch. 80, p. 271. To an understanding of the question here presented, it is not necessary to set forth the act in detail. Generally, it may be said that it defined the terms "bank," "trust business," and "trust company," provided for the incorporation of banks and trust companies, and prescribed and limited the business in which such companies might engage. In § 24 (p. 281) the powers of a trust company are specified. In § 14 (p. 275) it is provided:

"The term 'trust business' shall include the business of doing any or all of the things specified in subdi-

visions 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of section 24 of this act.

"The term 'trust company,' where used in this act, unless a different meaning appears from the context, means any corporation, organized under the laws of this state, engaged in trust business."

Section 15 (p. 276) of the act provides:

"No person shall engage in banking except in compliance with and subject to the provisions of this act, except it be a national bank or except in so far as it may be authorized so to do by the laws of this state relating to mutual savings banks, nor shall any corporation engage in a trust business except in compliance with and subject to the provisions of this act, nor shall any bank engage in a trust business, except as herein authorized, nor shall any bank or trust company establish any branch: Provided however, That any bank or trust company may participate in membership in the federal reserve banking system of the United States and may to that end comply with any requirements or laws of the United States or any rules or regulations duly promulgated pursuant thereto, anything elsewhere in this act to the contrary notwithstanding."

Section 18 (p. 277) provides:

"The name of every bank shall contain the word 'bank,' and the name of every trust company shall contain the word 'trust.' No person except:

"(1) A national bank;

"(2) A bank or trust company authorized by the laws of this state;

"(3) A foreign corporation authorized by this act so to do, shall,

"1. Use as a part of his or its name or other business designation or in any manner as if connected with his or its business or place of business any of the following words or the plural thereof, to wit: 'bank,' 'banking,' 'banker,' 'trust.'

"2. Use any sign at or about his or its place of business or use or circulate any advertisement, letterhead, billhead, note, receipt, certificate, blank, form, or

any written or printed or part written and part printed paper, instrument or article whatsoever, directly or indirectly indicating that the business of such person is that of a bank or trust company.

"Every person who, and every director and officer of every corporation which, to the knowledge of such director or officer violates any provision of this section shall be guilty of a gross misdemeanor."

Section 37 (p. 291) provides:

"A bank or trust company may purchase, hold and convey real estate for the following purposes and no other:

"(1) Such as shall be necessary for the convenient transaction of its business, including with its banking offices other apartments in the same building to rent as a source of income: Provided, That as to any corporation hereafter organized not to exceed thirty per cent of its capital and surplus and undivided profits may be so invested: And provided further, Any bank or trust company heretofore organized shall not hereafter invest in the aggregate to exceed thirty per cent of its capital, surplus and undivided profits in a bank building without the approval of the state bank examiner.

"(2) Such as shall be purchased or conveyed to it in satisfaction, or on account of, debts previously contracted in the course of its business.

"(3) Such as it shall purchase at sale under judgments, decrees, liens or mortgage foreclosures, against securities held by it.

"(4) Such as a trust company receives in trust or acquires pursuant to the terms or authority of any trust.

"No real estate specified in subdivision four shall be considered an asset of the corporation holding the same in trust nor shall any real estate except that specified in subdivision one be carried as an asset on the corporation's books for a longer period than five years from the date title is acquired thereto, unless an extension of time be granted by the state bank examiner."

Section 78 (p. 306) provides:

"Every corporation, which at the time this law becomes operative, is actually and publicly engaged in banking or trust business in this state in full compliance with the laws hereof, which were in force immediately prior to the time when this law becomes operative, may, if it otherwise complies with the provisions of this act, continue its said business, subject to the terms and regulations hereof and without amending its articles of incorporation, although its name and the amount of its capital stock, the number or length of terms of its directors or the form of its articles of incorporation do not comply with the requirements of this act: Provided:

"(1) That any such bank, which was by the state bank examiner lawfully permitted to operate, although its capital stock was not fully paid in, shall pay in the balance of its capital stock at such times and in such amounts as said examiner may require.

"(2) That any bank or trust company which shall amend its articles of incorporation must in such event comply with all the requirements of this act.

"(3) That the directors of trust companies at the time this act becomes operative may continue to hold such office for the terms for which elected, but the terms of all directors hereafter elected shall be governed by this act."

Section 79 (p. 307) provides:

"Any corporation existing at the time this act becomes operative, the name of which contains any word, the use of which by such corporation is prohibited by this act, may nevertheless continue the use of such name for a period of time not exceeding ninety days from the time this act becomes operative. Any such corporation may file supplemental articles of incorporation within such period changing its corporate name to comply with the requirements of this act without the payment of any filing fee for so doing but such supplemental articles shall contain no other amendment."

The act further provides for the appointment of a state bank examiner, conferring on him visitorial and inquisitorial powers with reference to banks and trust companies, and generally makes it his duty to see that such companies comply with the provisions of the act. It also provides for periodical reports from banks and trust companies to the examiner, showing their resources and liabilities in such form as the examiner shall prescribe, and authorizes him to take possession of such companies as are insolvent or fail to comply with the provisions of the act, wind up their affairs, and distribute their assets.

The present action was begun by the appellant in September, 1917, against the then bank examiner and the *Attorney General* to restrain them from enforcing as against it the provisions of the act. In its complaint the appellant set forth that a dispute had arisen between it and the bank examiner touching the meaning and proper construction of the act before mentioned; that the bank examiner contended that the appellant was operating in violation of the act, had threatened to prosecute its officers criminally, and had threatened to and would, with the aid of the *Attorney General,* take possession of its business and assets, wind up its affairs, and dissolve it as a corporation. It further alleged, and its proofs tended to show, that it had, by an honorable course of dealing, built up an extensive and valuable business; that its name and good will were valuable; all of which would be destroyed by the acts of the officers named, if not restrained by the court. It also alleged, and tendered proofs to the effect, that it intended at some future time to engage in the trust business, as its articles of incorporation authorized it to do, and that it had theretofore entered into negotiations looking to the sale of

its stock and franchise to persons contemplating engaging in the trust business. The trial court, at the conclusion of the trial, held that the appellant had failed to prove a cause of action, and entered a judgment of dismissal. This appeal followed.

The appellant first contends that the statute upon which the respondents rely as their authority for visiting upon it the penalty which it seeks to enjoin is not applicable to its situation. The contention in effect is that, since the appellant's articles of incorporation authorize it to engage in a trust business, it is, in law and in fact, a trust company and may lawfully use the word "trust" in its corporate name, notwithstanding it has and exercises powers not pertaining to the trust business and does not actually engage in such business; and that, since it does not actually engage in a trust business, it is not subject to visitation by the bank examiner, or compelled to make reports to that officer, or otherwise comply with the requirements of the banking and trust company act.

In support of the first branch of the contention, it is argued that the provisions of § 18 of the act, defining what character of corporation may use the word "trust" in its corporate name, are not limited by the definition of the term "trust company" as a corporation engaged in the trust business; but the term is used in its broader and more usual signification of a corporation having the powers of a trust company whether it is engaged in a trust business or not, and, so construing it, there is nothing in the section which prohibits the appellant from using the word "trust" in its corporate name. In further support of the same contention, attention is called to the somewhat peculiar wording of subdivision 2 of the section cited, and it is argued therefrom that the use of the phrase "author-

ized by the laws of this state" evidences an intent on the part of the legislature to permit any corporation having trust powers to use the word "trust" in its corporate name. The rule which requires ambiguous words of a statute to be given that meaning which will best protect the innocent and not work an injury to, or the forfeiture of, property is also invoked; the conclusion drawn being that, if the words of the statute do not clearly indicate the meaning the appellant puts upon them, they are ambiguous and will be given the meaning contended for in order that valuable property rights which the appellant has lawfully acquired may not be destroyed.

But, however plausible this reasoning may seem, we cannot think it correctly reflects the purpose of the legislature. The act in question, and other recent acts which it supersedes, make it clear, we think, that the legislature, in their enactment, had in mind a definite purpose. That purpose was to segregate the business of banking and the trust business from other businesses in which corporations might engage, provide for the organization of corporations whose businesses should be confined to these businesses alone, and subject them to supervision and penalties not imposed on corporations engaged in business of a more general nature, not capable by incompetence, mismanagement or fraud, of causing the harm to the general public that incompetence, mismanagement and fraud in this particular class of corporations cause. We have cited and quoted sufficiently from the provisions of the act, we think, to make this conclusion plain. There is a definition of the things which shall constitute a banking or a trust business, a provision for the incorporation of companies which shall engage in the business alone, supervision by a public officer over such corpo-

rations is provided, and penalties imposed upon the stockholders in such corporations not imposed upon stockholders of other corporations. Further than this, it is provided that no corporation shall engage in the trust business except as authorized by the act, that no corporation shall use the word "trust" in its corporate name except a corporation authorized by the laws of the state; that such a corporation shall not purchase, hold, or convey real estate except for limited purposes; and finally, that no corporation existing at the time the act becomes operative, the name of which contains any word prohibited by the act, may continue its business for a period longer than ninety days, permitting such corporations to file supplemental articles of incorporation without fees, changing its name so as to omit the prohibited words. These provisions would be meaningless, it seems to us, were it not intended to put banks and trust companies into a distinct class, confine them to a banking and trust business, and confer upon them a distinctive title, so that any person dealing with them might know from such title that they were corporations with limited powers and subject to the state's supervisory control.

We cannot agree with the appellant in its contention that the term "trust company," as used in § 18 of the act, has a broader meaning than is accorded to the term in the definition found in § 14. It is true that the term is followed by the phrase "authorized by the laws of this state," but a reading of other provisions of the act, particularly the subdivision following the subdivision from which the phrase is taken, convinces us that the legislature intended by the phrase merely to differentiate between corporations organized under the laws of this state to engage in a trust business and corporations organized in a for-

eign jurisdiction which the act authorizes to engage in the business. Nor do we find the meaning of the section ambiguous, rendering applicable the rule of construction governing statutes of ambiguous wording. If the purpose of the legislature is, as we conclude it to be, to define what shall constitute a trust business, provide for the incorporation of companies whose sole business shall be confined to a trust business, subject them to the state's supervisory control, give them a distinctive name, and prohibit corporations engaged in any other business, whether authorized to do a trust business or not, from using the distinctive name, the subdivision of § 18 called in question is in harmony with that view if construed in accordance with the definition in § 14. On the other hand, it seems to us that it would render the particular section, as well as the whole act, ambiguous to construe it in accordance with the appellant's contention.

The appellant further contends that, if the statute is to be given the meaning we have put upon it, it is void and unenforcible as violative of both the state and Federal constitutions. But to this we cannot accede. Section 1, art. 12, of the state constitution reads as follows:

"Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended, or repealed by the legislature at any time, and all corporations doing business in this state may, as to such business, be regulated, limited, or restrained by law."

The appellant was organized under the general incorporation laws enacted pursuant to this provision of the constitution, and is, of course, subject to the restrictions therein imposed. While it may be that the state cannot grant rights unconditionally and after-

wards place restrictions on the granted rights to the injury of one taking under them, there is no doubt that it may prescribe and enforce any right which it has reserved to itself, regardless of such injuries. Here the rights reserved are to regulate, limit and restrain. Under them the legislature may do all that it has attempted to do in the act before us. The act is not, therefore, in our opinion, violative of the state constitution.

Nor do we think the act violative of the Federal constitution. The contention under this head is that it is a taking of the appellant's property without due process of law. But since the state, in the law providing for the appellant's incorporation, reserved the right to alter, amend or repeal such law, and since it reserved the right to regulate, limit and restrain the business the corporation might do under the law, it is in no sense a taking of its property without due process of law to put in force such reserved rights.

The judgment is affirmed.

MAIN, C. J., PARKER, TOLMAN, and MITCHELL, JJ., concur.

[No. 14830. Department One. October 15, 1918.]

UNION MACHINERY & SUPPLY COMPANY, *Appellant*, v. WILLIAM McCUSH, *as Receiver etc., Respondent*.[1]

RECEIVERS (36)—PROPERTY—TITLE—PROPERTY CONDITIONALLY SOLD. In replevin against the receiver of an insolvent vendee in a conditional sales contract, the receiver's wrongful detention of the property after notice of forfeiture of the sales contract and demand for return of the property, subjects the receiver to the legal measure of damages usual in such cases, and not to a contractual measure provided for in the conditional sales agreement, to which the receiver was not a party.

SAME (36). In such a case, the receiver would not be personally liable for legal expenses contracted for by the seller, in addition to statutory costs and disbursements, nor for the cost of returning the property from its place of detention stipulated for in the bill of sale—since the receiver did not assume the insolvent's contracts; nor could the same be made preferred claims against the insolvent's estate.

APPEAL (375)—REVIEW—WHAT REVIEWED IN GENERAL. Error in refusing to treat and allow items as claims against an insolvent cannot be urged where there was no request therefor, and no evidence as to the amounts allowable.

SALES (182)—CONDITIONAL SALES — DEFAULT — DAMAGES FOR DETENTION. Damages for detention after default of machinery conditionally sold, cannot be recovered until lapse of a reasonable time for its return.

SAME (182). Damages stipulated in a conditional sales contract for wrongful detention after demand cannot be allowed as a claim against an insolvent vendee's estate, where the property has passed into the hands of a receiver and the default was that of the receiver.

RECEIVERS (53)—MANAGEMENT OF PROPERTY—CONDITIONAL SALES CONTRACT—EXPENSES OF LITIGATION. Upon replevin against the receiver of an insolvent vendee in a conditional sales contract, for wrongful detention of the property after demand upon the receiver, the vendee's estate cannot be charged with the expenses of the litigation.

CONTRACTS (41)—VALIDITY—PUBLIC POLICY—CONDITIONAL SALES. A conditional sales contract providing that the vendee shall pay five per cent on the contract price, in addition to costs and disburse-

[1]Reported in 175 Pac. 559.

ments allowed in case of a successful action to recover the property, is void as against public policy.

SALES (182) — CONDITIONAL SALES — CONTRACTS — CONSTRUCTION. The expenses of a visit by the vendor to the vendee in a conditional sales contract, in an endeavor to adjust the claim, and expenses in returning the property, are not recoverable as expenses incurred in collecting the claim or returning the property as stipulated in the contract, in the absence of any proof that the expenses were reasonable or necessary.

SAME (182). Under a conditional sales contract expressly agreeing to repay freight and the cost of insurance, advanced by the vendor, such items are recoverable as being in addition to the purchase price, whether there was a forfeiture of the contract or not.

PLEDGES (1)—CREATION OF LIEN—AFTER ACQUIRED PROPERTY. A provision in a conditional sales contract pledging to the vendor all of the vendee's property then owned or thereafter acquired as security for the purchase price, does not create a lien thereon, so as to constitute the same a preferred claim as against other creditors upon property of the vendee in the hands of a receiver.

Consolidated appeals from a judgment of the superior court for Whatcom county, Pemberton, J., entered September 27, 1917, upon findings in favor of the defendant, in an action in replevin, tried to the court, and from an order entered December 21, 1917, rejecting claims in a receivership of an insolvent corporation, after a hearing before the court upon objections thereto. Judgment affirmed; order reversed.

Walter S. Fulton, for appellant.

Hadley & Abbott and *Sather & Livesey,* for respondent.

FULLERTON, J.—The appellant, Union Machinery & Supply Company, whose place of business is at Seattle, in King county, on August 21, 1916, sold to the Kendall Lumber & Shingle Company, whose place of business is at Kendall, in Whatcom county, certain machinery and supplies for a consideration of $2,245, of which sum

$500 was paid in cash, and the balance payable in nine monthly installments of practically equal amounts, with interest at the rate of ten per cent per annum. A conditional sale contract was entered into, stipulating that the legal and equitable title to the property sold should remain in the vendor until payment in full of the purchase price. The contract also contained other features. On its face it recited that the vendee directs the vendor to ship the purchased goods to Kendall, advancing the freight charges, and that the vendee agrees to pay the local cartage and freight in all cases; and that the terms, conditions, and security printed on the back of the contract were agreed to as part of the consideration for the sale and their performance warranted by the vendee. On the back of the contract, printed in brevier type, was the following:

"Terms, Conditions and Security Referred to on the face of this Contract.

"(1) It is agreed that the material herein described shall be at the risk of the vendee when receipted for transportation, however the same may be shipped. And all loss thereof and damage thereto thereafter shall be borne by the vendee.

"(2) Retention of the goods conditionally sold for a period of 10 days after taking possession, without written complaint by the vendee to the vendor, shall create a conclusive presumption that the same are satisfactory.

"(3) Should the property conditionally sold, or any part thereof, be transported by water, marine insurance to the full value thereof shall be provided by the vendee. And in all cases and at all times the vendee shall keep the property insured against loss and damage by fire in an amount equal to the unpaid purchase price thereof. And if the subject of sale is a boiler, or has a boiler as a constituent part thereof, the vendee shall keep the same insured against loss and damage by explosion in an amount equal to the value thereof. And if it be an auto vehicle, it shall be kept insured

against collision and damage to the vehicle itself, damage to the property of others, against theft thereof and all its parts, and against liability for injury to and death of persons. The insurance companies and policy forms shall be approved by the vendor, who shall be named as the assured in the policies, and all policies shall be delivered to and held by the vendor. In case a loss should occur under any policy, an amount equal to the indemnity paid shall thereupon become immediately due and payable under this contract when the insurance money is received, irrespective of the state of the notes, except where the loss is for injury to or death of a person or persons. But if such insurance money should more than equal the total amount unpaid on the notes, including all sums otherwise due, then the over-plus shall be paid by the vendor to the vendee. No loss or damage, whether by fire or otherwise, shall operate to diminish or extinguish the liability of the vendee to the vendor hereunder, except through the payment of the insurance aforesaid.

"(4) It is agreed that the vendor may apply money received from the vendee, either upon this contract, any other conditional sale contract, lease, note, open account, or other debt, held by the vendor, as its president or secretary may elect. The right of the vendee to make special application of payments being hereby expressly waived.

"(5) The vendor may take from the vendee any form of security for the payment of the notes and the performance of the conditions of this contract, except a mortgage on the property conditionally sold; joint makers, sureties, endorsers and guarantors may be accepted on said notes; additional time for payment may be granted; new notes taken in place of old ones with security therefor; any and all security realized upon, notes reduced to judgment and the judgment enforced, without such action passing title to said property to the vendee, unless compliance with the conditions precedent set forth in section 7 hereof are thereby effected. Nor shall any default or provision of this contract be waived or invalidated thereby.

"(6) Should any note become due and be not paid, satisfactory security shall be given as a condition of extension. And no acceptance of money due, or delay in enforcing this contract, shall be deemed an extension, or waiver of default, unless such security be given.

"(7) The legal and equitable title to the property shall at all times remain in the vendor until the purchase price thereof as evidenced by the notes described herein, and any renewals thereof, or judgments thereon, (or as evidenced by this contract in case no notes were given), and all other sums owing from vendee to vendor, arising under this contract or otherwise, prior or subsequent in date, mature or immature, shall have been paid in full, and each and all of the warranties, covenants and stipulations are complied with. That such payment and compliance shall be conditions precedent to the vesting of title, either legal or equitable, in the vendee.

"(8) The notes executed by the vendee shall not be deemed a payment of the purchase of the property, but shall be considered in connection with, taken as a part of, and be subject to the terms of this contract. And in case the notes described herein are not executed, the vendee shall be liable hereon just the same as if said notes were made and delivered coincident herewith.

"(9) No person, copartnership, corporation, public officer, court, officer of any court, assignee for the benefit of creditors, receiver in insolvency, or receiver or trustee in bankruptcy, shall have the right to acquire through the vendee any right, title in or lien upon said property or any part thereof, or to be in possession thereof, or to use the same, or to make payments on this contract, whether by voluntary agreement or by operation of law. And in case of assignment, receivership or bankruptcy, the vendor may make and serve notice of default upon the vendee with the same force and effect as if served prior to such assignment, insolvency or bankruptcy, for an arrearage in payments then existing.

"(10) The vendee shall pay all damages to the

property suffered by him, and keep the same in first class condition and repair. All repairs, substitutions and betterments made by the vendee shall immediately become the property of the vendor, and subject to the terms of this contract.

"(11) It is expressly understood that time is of the essence of this contract, and that upon the failure of the vendee to make all payments when due, and to strictly perform all of the conditions, stipulations and warranties, then, without any notice, the vendee shall be deemed in default, and all rights of the vendee in and to the property shall cease and determine, and all money paid by the vendee to the vendor shall be forever held and retained by the latter as liquidated damages. And if the vendor demands the return of the property to Seattle, said vendor may at once go upon the premises where said property is located, remove the same without legal process, return it to Seattle, and enforce payment of the expense of moving, cartage, and transportation charges incident thereto, by the vendee. Provided, that if the property has been abandoned by the vendee, or if the vendee cannot be found either in the county where the property is located or in the county of his residence given herein, no demand shall be necessary to entitle the vendor to remove the same as above, recover the expense thereof as in other cases. That the vendor may also recover of the vendee all sums incidentally due on this contract, and in addition, may enforce payment of the balance unpaid on purchase price, and forever retain the same as liquidated damages.

"(12) All costs and expenses incurred in collecting or trying to collect the notes hereinafter due, and all expenses and transportation charges in case the property is returned to the vendor by the vendee, shall be paid by the vendee.

"(13) For failure to make any payment required, or for failure to comply with any of the warranties, terms and conditions herein contained, the vendor shall have the right at once to enforce payment of all the moneys required hereby, and if full payment is not obtained the money collected may be retained as liqui-

dated damages, and the vendor may also demand the return of the property, retake the same, and forever retain it without any claim thereto by the vendee.

"(14) That in case a replevin action or other legal remedy should be instituted to regain possession of the property, and the defendant should rebond, or in any other manner the plaintiff therein should be delayed by the defendant in obtaining possession thereof, and the judgment should be in favor of the plaintiff for possession, then there shall be allowed the plaintiff and made a part of the judgment as damages for each day so delayed, the sum of ¼ of 1% of the contract price thereof herein, which said amount is hereby agreed upon as the reasonable and ordinary rental value of the property at Seattle, for use at the premises of the vendee.

"(15) And in the event that the vendor should successfully prosecute any action or proceeding to repossess itself of said property, or to secure or protect its rights herein, then the vendee shall pay the vendor the sum of 5% of the contract price of the property herein, the minimum of which shall be $50, which shall be made a part of the judgment to cover the expenses of such litigation, in addition to the ordinary costs and disbursements allowed by law in civil actions.

"(16) Should any person, copartnership or corporation become possessed of the property through the action of the vendee, which is consented to by the vendor, all of the obligations hereby imposed upon the vendee shall become joint and several obligations of the successor in possession, just the same as if this contract and the notes herein described had been originally signed by such successor in possession. But this shall not relieve the original vendee of any liability.

"(17) Should any person, copartnership or corporation other than the vendee become possessed of the property without the vendor's consent, he shall be liable to the vendor for the use thereof at the rate of ¼ of 1% of the contract price thereof per day while so in his possession. And in such cases the vendor may without preliminary demand for possession and without process, seize the property, return it to Seattle,

and recover the expenses thereof from such party so in possession, or from the vendee.

"(18) In case the contract and notes described herein are not dated when signed, the vendee authorizes the vendor to date them as of the day when the first shipment is made hereunder.

"(19) When this contract is entered into in pursuance of an order which includes belting or other material which is impossible at the time to particularly describe, it is agreed that the specifications thereof may be written herein by the vendor after signing by the vendee.

"(20) Said property shall be used only for the purpose for which it was designed.

"(21) The vendee will not permit said property to become affixed to the real estate.

"(22) The vendee assumes and agrees to pay all assessments and taxes levied and all liens and encumbrances, which are now a charge upon the property or which may become a charge thereon hereafter.

"(23) All persons signing this contract as officers or agents of the vendee shall be bound hereon as principals.

"(24) The vendee covenants not to violate any of the United States Letters Patent relating to any of the property herein described, which is either controlled by the vendor, or under which the vendor has the right to manufacture and sell any of such property.

"(25) This contract is not subject to cancellation except by written agreement of both parties hereto. And in case the vendee should notify the vendor not to make delivery of the goods, or refuse to accept them when shipped, the vendor may retain or retake the property, and at once sue the vendee and recover judgment for the total amount to be paid hereunder, including any transportation charges, cartage, storage and insurance incurred, and the allowance to indemnify the vendor against expenses of litigation as in section 15, in addition to the usual costs and disbursements allowed by law in civil actions. Thereupon the property shall be sold by the sheriff under execution, the proceeds applied on the judgment, and the security

below given realized upon for the payment of the deficiency. That the balance remaining unpaid, if any, may be collected from the vendee by general execution.

"(26) Delivery of the property by the vendor is made contingent upon strikes, accidents and delays unavoidable or beyond the control of the vendor.

"(27) The vendor shall not be held responsible for any repairs, consequential damages, or loss resulting from defective machinery.

"(28) The notes herein, renewals thereof, or any of them, may be used as collateral security by the vendor without an assignment of this contract. And no such pledge shall invalidate this contract or pass title to the property to the vendee.

"(29) In case the vendee fails to perform any obligation imposed herein, the vendor may do so at vendee's expense.

"(30) All rights of the vendor shall pass to and be enforcible by the vendor's successors and assigns.

"(31) The parties hereto agree that upon the strict performance by the vendee of all the warranties, covenants, conditions and payments herein required, the absolute title to the property, both legal and equitable, shall pass to and vest in the vendee, free from any right or claim whatever by the vendor.

"(32) No salesman or officer has authority to agree to this conditional sale upon any condition other than as printed herein, except in the manner permitted by section 35 hereof.

"(33) And as security for the payment of all sums due and which may become due hereunder to the vendor, and all other debts now due or which may become due hereafter to said vendor from the said vendee or any others who may be liable hereon, whether said debts are in existence at the present time or hereafter incurred, said vendee and others liable hereon hereby mortgage to said vendor, all property now owned and which may be acquired by them hereafter, described as follows: All machinery of every character and description, including all logging, saw mill and shingle mill machinery, and rails, tools, equipment and supplies usually employed in connection therewith; all

logs, timber, rough and finished lumber, laths, shingles and slabs; also all contractors machinery, tools and equipment; also all accounts receivable and bills receivable, office furniture and fixtures; all live stock and increase thereof; and all other personal property; also all land, and all crops on said land now sown or planted, and which may be sown or planted within one year from the date hereof. Said property being located in the county where the property conditionally sold hereby is to be used, and in the counties where the vendee and others liable hereon may reside, and where they may have business operations pending. And if said party of the second part or others liable hereon shall fail to make the payments required hereby, or if they or either of them shall fail to pay any other indebtedness aforesaid on demand after the same is due, then the party of the first part may take possession of the property so mortgaged, using all necessary force so to do, and immediately sell the same in the manner provided by law by foreclosure sale, and from the proceeds pay the costs and expenses of the foreclosure proceedings, the litigation expenses provided for herein, the amount due hereunder, the amount due upon any other debt or debts aforesaid, and paying the surplus, if any, to the owners of the property so sold.

"(34) This contract shall not be deemed executed by the vendor, nor shall the vendor be bound by it in any manner, until it has been signed by its president or secretary.

"(35) The foregoing constitutes in all respects the contract between the parties hereto at the date of its execution, all previous communications between them, either verbal or written, being hereby abrogated and withdrawn. And no modification thereof or waiver of any of its terms shall be binding upon the vendor unless reduced to writing, endorsed hereon, and signed by the vendor's president or secretary."

The contract was recorded in both the conditional sale and chattel mortgage records of Whatcom county.

The machinery described in the contract was shipped

from Seattle to Kendall on August 26, 1916, and the freight advanced thereon by the appellant. In September and October of 1916, and in April, 1917, other merchandise was sold the vendee by the machinery company, and the freight thereon advanced by it. In December, 1916, the appellant procured insurance upon the property, paying the premium required by the company granting the insurance. On November 15, 1916, the vendee, being indebted to the Northwestern State Bank of Whatcom, executed and delivered to it real and chattel mortgages upon all of its property to secure the same, the chattel mortgages covering the property included in the appellant's contract of conditional sale. Action was brought to foreclose these mortgages on January 25, 1917, in which action William McCush, the respondent herein, was appointed receiver *pendente lite*. The vendee was then insolvent and largely indebted to other persons, and on July 25, 1917, the Morse Hardware Company, one of its creditors, brought an action on behalf of all its creditors, asking for the appointment of a general receiver, that the affairs of the vendee be wound up, that its property be sold, and that the proceeds of the sale be applied to the satisfaction of its indebtedness. In this action McCush was appointed general receiver.

On June 22, 1917, the appellant declared a forfeiture of its conditional sale contract and demanded a return of the property therein described to it at Seattle. The demand was telegraphed to the vendee on the same day, but return of the property was not made and the property passed into the possession of the receiver *pendente lite* appointed in the suit of the bank some two days later, and later on into the possession of the general receiver appointed in the suit begun by the Morse Hardware Company.

On September 21, 1917, the appellant began an action

against the receiver to recover the property described in the conditional sales contract. In its complaint, in addition to pleading facts showing its right to a return of the property, it alleged that, under and by virtue of "sections 14 and 17" of the conditional sales contract, it was entitled to recover of the receiver for his wrongful detention of the property the sum of one-fourth of one per cent of the contract price thereof per day, or the sum of $5.60 per day from the time he took possession until the final return of the property; that, under section 17 of the contract, he was liable to the expense of returning the property to Seattle, which would amount to $430; and that, because of the refusal of the receiver to deliver the property on the appellant's demand, he became liable to appellant under section 15 of the contract in the sum of five per cent of the contract price of the machinery, or the sum of $112.25. In the prayer of its complaint, judgment was demanded for a return of the property and for the several sums mentioned, in addition to usual costs and disbursements allowed by law. Issue was taken on the allegations of the complaint and a trial had, in which the court adjudged the appellant entitled to a return of the property at the mill of the Kendall Lumber & Shingle Company, the place where it was held by the receiver, and for the usual and ordinary costs and disbursements allowed the prevailing party by the statutes, denying a recovery for the other items set forth in the complaint.

Later on, the appellant filed a claim with the receiver, claiming freight prepaid on the machinery sold under the conditional sales contract, $131.53; goods, wares and merchandise subsequently sold the lumber company, $322.60; fire insurance premium paid, $167.80; expense of collector visiting the lumber company in an attempt to collect the debts, $50; retention

of the conditional sale property by the receiver after demand, at the percentum rate named in the contract of conditional sale, $548.80; expense of returning the property to Seattle, $430; expense of legal proceedings over and above the usual costs and disbursements, $112.25; making a total of $1,762.98. On this sum it allowed a credit of $153, leaving a net balance of $1,609.98. It also claimed a preferred lien in the amount of the net balance on all of the property of the lumber company superior in right to the claims of all other creditors, basing the claim upon the various terms of the contract of conditional sale, and particularly upon the mortgage clause therein contained. The receiver, on behalf of other creditors, objected to the allowance of the several items claimed, and especially to their allowance as preferred claims. The trial court, on the hearing, allowed on the item for freight $30.40, and for goods, wares and merchandise sold the sum of $322.60, disallowing the remainder of the items. From the sum allowed, it deducted the admitted credit, leaving a net balance of $200.05, sustaining the claim in this sum as a lien upon all of the personal property of the lumber company owned at the time of sale or subsequently acquired. The mercantile company appealed from the adverse part of the judgment in the action brought to recover the property described in the contract of conditional sale, and from that part of the last mentioned order in so far as it relates to the items of the claim rejected. The appeals were consolidated by stipulation of the parties and heard together in this court. The receiver does not appeal.

In the judgment entered in the action upon the conditional sale contract, we find no error. It was an action in replevin brought to recover property in specie. It was against an officer of the court, who held the property as the receiver of an insolvent debtor with whom

the contract giving rise to the cause of action was made. If the property did not belong to the insolvent and belonged to the appellant, the appellant was, of course, entitled to recover it; but in such an action, it was entitled to recover nothing more than the property itself or, in lieu thereof, its value, with the costs and disbursements allowed by statute and such incidental damages as the wrongful detention of the property by the receiver entailed. It could not recover for stipulated damages agreed upon between itself and the insolvent with whom the agreement was made. The wrongful detention was the receiver's wrong, not the wrong of the original contractor, and the measure for this is the legal measure, such as is usual in such cases, not a contractual measure to which the receiver was not a party. Nor would the receiver be liable in such an action for the other items demanded in the complaint. Conceding that a purchaser of property under a conditional sale contract may lawfully contract to pay, in addition to statutory costs and disbursements, such other legal expenses as the seller may be put to in an action to recover the property, such a contract would not be binding upon any other person who took the property from the contract purchaser. His liability is measured by his own contracts or his own wrongs, not the contracts or wrongs of another. The same rule applies when the wrongful detention is by a receiver. He assumed none of his insolvent's contracts by his appointment as receiver and his acceptance of the trust. So with the claim for the return of the property from its place of detention to the place stipulated in the contract. This was not the receiver's contract and no liability could attach to him therefor. If it is a valid claim, it could be presented to, and enforced against, the receiver as a general claim against the insolvent's estate, but no personal judgment

against the receiver or judgment making the claim a preferred lien against the insolvent's estate, such as is here demanded, can be recovered. Nor was the court in error in refusing to treat the several items as claims against the insolvent's estate and adjudicate them as such. In the first place, he was not asked so to do; and in the second place, no evidence was offered from which the amounts allowable can be ascertained. The judgment on this branch of the appeal will therefore stand affirmed.

As to the order made upon the claims presented to the receiver, we find no error in the rejection of the item for stipulated damages—that is, damages claimed for the retention of the property after demand for its return. Assuming, without deciding, that this was a proper subject of contract and that the contract made was not unconscionable, there was no basis shown upon which a recovery thereon can be founded. From the statement it will be remembered that the demand preceded the taking of possession by the receiver but two days. The demand did not take effect instanter. Owing to the nature of the article demanded and the distance it was to be transported, the vendee had a reasonable time to comply therewith, and could not be in default until this reasonable time expired, and nothing in the record shows that the delay for the two days was unreasonable. After the property passed into the possession of the receiver, it was in the custody of the law, beyond the control of the vendee, and he is not, nor is his estate in the hands of the receiver, liable for the delays occurring subsequent to that time.

Nor is the claim for expenses of litigation chargeable against the fund in the possession of the receiver. The action in which they were incurred was not an action against the vendee of the property. It was an action against the receiver arising after the property had

been taken from the possession of the vendee. The necessity for the action did not arise from any default of the vendee; it arose from the receiver's default, and neither the vendee nor his estate is liable beyond the costs prescribed by statute for the defaults of the receiver. But the contract was unenforceable in any event. By it the vendee of property in a conditional sale contract agreed to pay five per cent on the contract price as expenses of litigation, in addition to the costs and disbursements allowed against him in the case of a successful action brought by the vendor to repossess itself of the property. Such a contract is void as against the policy of the statute which in itself fixes the expenses so recoverable.

So, also, as to the item claimed as expenses in an endeavor to collect the claim. While it may be that the evidence discloses the fact that this sum was expended in a visit by the collector of the vendor to the vendee in which an effort was made to adjust the account, this was insufficient to make the item an obligation against the vendee, conceding that expenses of this sort are within the terms of the contract. The vendee did not agree to pay any and all expenses which the vendor saw fit to incur. Its contract must be construed to mean that it will pay the reasonable and necessary expenses incurred in collecting, or trying to collect, the account, and there is nothing in the record to show that the visit in which this expense was incurred was either reasonable or necessary. The item claimed as expense necessary to return the property to Seattle was also properly rejected; this for the reason, if no other, that the record fails to show that the expense was incurred. The promise did not create a liability. There must be proof of an actual return, or an intent to return, with definite proof of the actual or the necessary

expense of so doing. The record is wholly lacking in this respect.

We think, however, that the court erred in refusing to allow the item paid for freight, $101.08, and the insurance premium of $167.80. The court evidently denied a recovery of these items on the theory that they constituted a part of the purchase price of the machinery sold under the contract of conditional sale, and were satisfied by the forfeiture of the contract and the retaking of the property. But, as we read the contract, there was an express contract to repay the freight in case it should be advanced by the vendor, and an express promise to keep the property insured to the amount of the unpaid purchase price. The expense of this would be in addition to the purchase price and repayable when advanced by the vendor, regardless of whether there was or was not a subsequent forfeiture of the contract.

But we cannot conclude that the obligation is in any manner secured or made a lien upon the vendee's property, valid as against other creditors, by the mortgage clause in the contract of conditional sale. That instrument is nothing more than a signed, acknowledged, verified and recorded statement to the effect that the vendee pledges to the vendor all of his property then owned or thereafter to be acquired as security for all obligations which the vendee may then be owing or may thereafter incur to the vendor. Such a general statement cannot create a lien on property under the statutes of this state. To create such a lien the instrument must name as the sum secured a definite sum then owing, or a definite sum to be advanced in the future, and the property pledged must be described with reasonable certainty, so that the obligation secured and the property pledged may be ascertained by the aid of the record and by such extrinsic inquiry as the rec-

ord suggests. Any other rule would open the door to the very frauds the legislature had taken so much pains to circumvent.

The order appealed from is therefore reversed, and the cause remanded with instructions to allow the two liens last mentioned as general claims against the property of the insolvent debtor now in the possession of the receiver. Neither party will recover costs in this court.

MAIN, C. J., MITCHELL, TOLMAN, and PARKER, JJ., concur.

[No. 14920. Department One. October 15, 1918.]

THE STATE OF WASHINGTON, *on the Relation of E. A. Sims, Plaintiff*, v. CLARK V. SAVIDGE, *as Commissioner of Public Lands, Respondent.*[1]

MINES AND MINERALS (1-A)—LEASE OF STATE LANDS—STATUTES—CONSTRUCTION—IMPLIED REPEALS. Laws 1917, p. 599, amending Rem. Code, § 6783, as to applications for lease of state lands for mining purposes, so as to require the application to be made by legal subdivisions according to the public land surveys, impliedly repeals other provisions of the law requiring, as a condition precedent to a lease, that the applicant set corner posts and post location notices as required for the location of mineral claims upon the government domain.

Application filed in the supreme court August 3, 1918, for a writ of mandamus to compel the commissioner of public lands to issue a lease for mining prospecting purposes on state lands. Granted.

Kerr & McCord, for relator.

The Attorney General and *John A. Homer, Assistant*, for respondent.

[1]Reported in 175 Pac. 568.

PARKER, J.—The relator Sims seeks a writ of mandate from this court to compel the state land commissioner to issue to him a lease for mining prospecting purposes covering eighty acres of state land, described as the west ½ of the N. W. ¼ of section 36, township 27, north, of range 2, west, in Jefferson county.

The facts upon which Sims seeks to have the lease issued to him may be summarized from his petition, which is resisted by general demurrer only, as follows: Sims, having found precious minerals upon the lands which he seeks to lease, on June 26 last, applied to the state land commissioner for a lease thereof for the term of two years for mining prospecting purposes. The application was made as prescribed by law and the regulations issued by the land commissioner and was accompanied by the required fee. The land belongs to the state and is subject to being leased for mining prospecting purposes. The commissioner "refused to accept said application for the lease of said lands for prospecting purposes upon the sole ground that the said application failed to show that said mineral lands had been located in accordance with the provisions of the laws of the United States and of the state of Washington regulating the location of mineral claims upon the Federal domain, and that said application did not disclose that notices of said location had been posted and corner posts established to mark the boundary lines of the location."

It is conceded in the briefs of counsel that the question here for determination is as to whether or not it is a prerequisite of Sims' right to have a lease for this land issued to him for mining prospecting purposes that he shall have posted location notices and set corner posts marking the boundaries of the land as required by the statute relating to the location of mineral claims

upon United States government lands. It seems plain that, under the act of 1897 and the amendments thereto prior to the amendment of 1917, it was necessary that there be notices of location posted upon the land and the marking of the boundaries thereof by the applicant, as in the location of mineral claims upon United States government lands, before he would have a right to a lease thereof for prospecting purposes. But whether or not the amendment of 1917 has rendered unnecessary the posting of notices and marking of the boundaries as in the case of locating mineral claims upon United States government lands is the real question here to be determined.

Referring to § 6782 and following of Remington's Code, we find the act of 1897, as amended, relating to the leasing of state lands for mining prospecting and development purposes, prior to the amendment of 1917, in so far as we need here notice its terms, as follows:

Section 6782 reads:

"The commissioner of public lands of the state of Washington is hereby authorized to execute leases and contracts for the mining of gold, silver, copper, lead, cinnabar or other valuable minerals except coal, from any land or tide and shore lands belonging to the state or from any lands or tide and shore lands to which the state may hereafter acquire title, subject to the conditions hereinafter provided . . ."

Section 6783 reads:

"Any citizen of the United States finding precious minerals upon any lands belonging to the state of Washington may apply to the commissioner of public lands for a lease of any amount not to exceed eighty acres for prospecting purposes, provided that said applicant has posted up location notice and set corner posts and marked boundary lines as required by the mining laws of the state of Washington; . . ."

Section 6784 reads:

"The manner of locating a mineral claim upon state land shall be similar to the state law regulating locating mineral claims on government lands . . ."

Section 6786 reads:

"Before any lease shall be granted, the applicants shall pay to the state treasurer the sum of five dollars for each forty acres or fraction thereof. The holder of a mineral lease, secured as above stated, shall have two years to develop said mine or mines: Provided, that no more than five tons of ore shall be removed therefrom for assaying or testing purposes until a contract, as hereinafter provided, shall have been executed."

Section 6787 provides for a working mining contract or lease for the land, to be entered into between the applicant and the state at any time prior to the expiration of the two-year period covered by the lease for prospecting purposes, covering a period of not exceeding thirty years.

In *State ex rel. Pindall v. Ross,* 55 Wash. 242, 104 Pac. 216, decided in 1909, while the law was as above quoted, it was held that an applicant for a lease of state land for prospecting purposes, having complied with the law as then existing, the lands so applied for being subject to such a lease, had a right to have such lease issued to him, and to that end have the commissioner mandamused to issue the same. It was also held in that case that the land the applicant was entitled to have leased to him need not conform in its boundaries to the legal subdivisions according to the government survey, though the maximum eighty acres was applied for. This was in harmony with and in recognition of the provisions of the law as then existing requiring location notices and a description of the boundaries of the land as in the location of mineral claims upon United States government lands.

The legislature of 1917 again amended section 6783 so as to read as follows:

"Any citizen of the United States finding precious minerals upon any lands now or hereafter belonging to the state of Washington, may apply to the commissioner of public lands for a lease of any amount not exceeding eighty acres, for prospecting purposes, such application to be made by legal subdivisions according to public land surveys." Laws of 1917, p. 599.

Some other amendments to the law were then made, but they do not concern us here.

Did the portions of the amendment of 1917 providing, in effect, that the lease shall be for lands "by legal subdivisions according to the public land surveys" have the effect of repealing and rendering of no force those provisions of the law theretofore existing, and above quoted, calling for notices of location and marking of the boundaries of the land upon the ground as provided by the laws relating to the location of mineral claims upon United States government land? We think this question must be answered in the affirmative, though the act of 1917 is in terms not an independent act but an amendment of the act of 1897, as theretofore amended, and does not in terms repeal those provisions of the act of 1897 as amended, relating to location notices and the marking of boundaries, above quoted. We have not overlooked the general rule that repeals by implication are not favored, but it seems to us that, by the 1917 amendment, there is evidenced a legislative intent to substitute an entirely new method of designating and describing lands leased for prospecting purposes. That is, with reference to official government survey monuments already in existence. We conclude that no other designation or description of the land is required by the law as now amended, and that relator Sims is entitled to have a lease issued to him as ap-

plied for, and to have issued the mandate of this court requiring the state land commissioner to perform that duty. It is ordered that the writ issue as prayed for.

MAIN, C. J., HOLCOMB, CHADWICK, and MACKINTOSH, JJ., concur.

[No. 14465. Department Two. October 16, 1918.]

STANDARD LUMBER COMPANY, *Respondent*, v. DEER PARK LUMBER COMPANY *et al.*, *Appellants*.[1]

VENDOR AND PURCHASER (150) — REMEDIES OF VENDOR — ACTIONS FOR PURCHASE MONEY—DEFENSES—DEFECT IN QUANTITY. In an action for balance due on the purchase price of timber lands, mill and other property, defendant cannot claim a deduction for a shortage in the estimated quantity of 25,000,000 feet of white pine, where the quantity was not guaranteed and the vendees started their own cruise, which indicated to them a shortage before the contract was entered into.

SAME (156) — REMEDIES OF VENDOR — ACTIONS FOR PURCHASE MONEY—AMOUNT OF RECOVERY. Where there was a sale in gross of timber lands, mill and other property, which was to be paid for by the deduction of the debts of the vendor and $10,000 paid by the vendees, and balance in preferred stock with interest without specifying any time for delivery, in an action for the price upon the vendees' default and refusal to deliver any stock, the vendor is entitled to a judgment in entirety for the balance due payable at once, instead of judgment for future payments evidenced by obligations of the defendant.

Cross-appeals from a judgment of the superior court for Spokane county, Sullivan, J., entered April 16, 1917, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Modified.

Graves, Kizer & Graves, for appellants.

Post, Avery & Higgins, for respondent.

[1]Reported in 175 Pac. 578.

PER CURIAM.—Plaintiff, of which W. H. Short was president and principal stockholder, owned about 13,000 acres of timber land, a short logging railroad, brick yard, and a sawmill with appurtenances, located near Deer Park, Washington. It was indebted in excess of $345,000 and had been seeking a purchaser for some time. In the latter part of 1913, plaintiff and defendants were brought in touch with each other, and early in January, 1914, defendants went to Deer Park. They were met by plaintiff's president, who took them in a sleigh through the timber land lying to the north of town the first day, and to the south of town the next day. Previous to this trip, statements of the assets of plaintiff had been given or shown to the defendants. At the head of these statements was "25,000,000 feet white pine @ $4.00—$100,000." Negotiations continued, and finally defendants took an option for the purchase of the property good until March 5, 1914.

Late in January, 1914, defendants sent a cruiser into the woods, who spent several weeks cruising under unfavorable weather conditions, and in the latter part of February, 1914, came to Spokane and gave defendants a report on that which he had cruised. The report indicated a shortage of about 4,000,000 feet of white pine and that about one-half of the tract had been cruised. This shortage was called to Short's attention. It is claimed that he asserted that there was the full quantity of pine, and that weather conditions were then so bad that no cruiser could do accurate work, and that, if there were any shortage in the tracts just cruised, it would be made up on the other parts, which were sure to overrun his estimate. Short assured them that there were 25,000,000 feet on the tract, but denied that he made any guaranty or urged that the deal be

quickly closed, and stated that they could have all the time they wanted for making cruises, but that the price then agreed upon was the lowest price he would take, and that they could either take the property at that price or leave it alone. The defendants continued the cruise, but claim that they received no further report on same, although they met their cruiser on March third. They could have received daily reports from him by mail. Under these conditions, defendants entered into the following contract, on or about March 5, 1914, omitting formal parts:

"(1) Witnesseth: That said vendor does hereby agree to sell and convey unto said vendees, and that said vendees do hereby agree to purchase of said vendor, all the real estate situate in Spokane and Stevens counties, state of Washington, which is designated in green in the annexed plat marked 'Exhibit A' and hereby made a part of this contract, including all that part of section thirty-four (34), township twenty-nine (29) north, range forty-two (42), E. W. M., upon which said mill is situate and used for mill purposes, being about one hundred twenty (120) acres, and which said real estate is to be fully described by government subdivisions and the description thereof to be hereto attached as a part hereof; also all timber standing upon the real estate described in the list hereto annexed, marked 'Exhibit B' and hereby made a part of this contract; the entire sawmill, planing mill, dry-kiln and brickyard situate and standing upon section thirty-four (34), township twenty-nine (29) north, range forty-two (42), E. W. M., at Deer Park, Washington, including all equipment used in connection therewith and all on hand at this time; the railroad known as Deer Park Central, and railroad equipment complete, sidetracks and log-dock; also all wagons, horses, harness, sleighs, logging tools, camp, camp outfit, two extra motors, and all personal property used in connection therewith and thereon, and also the contract to supply the town of Deer Park with water, except office fixtures and supplies, accounts and bills receivable,

swinging crane, traction engine and traction log-wagons, and one bay driving horse called 'Dolly'; also to convey all hay and feed located in the barn of said vendor standing upon section three (3), township twenty-eight (28), north, range forty-two (42), E. W. M., and at the camp, on section fifteen (15), township twenty-nine, (29), north, range forty-two (42), and the right to use said barn until September 1, 1914.

"(2) The purchase price of all of said property except the lumber and logs is the sum of four hundred nineteen thousand four hundred forty-five dollars ($419,445). For the logs situate in the mill-pond at Deer Park said vendees are to pay the following prices per thousand: tamarack and fir $5.50; western pine $6.50; white pine, $8, less $1 per thousand on sinkers as scaled during October, 1913; for all logs banked on the Deer Park Central the same rate as above, less $1.50 per thousand; for all logs which have been cut and skidded but not delivered in pond or upon railroad vendees are to pay only $1.75 per thousand. There should be deducted as stumpage from said purchase price for all logs cut by said vendor since January 1st, 1914, the sum of $4 per thousand for white pine; $1.50 per thousand for western pine, and $0.50 per thousand for tamarack and fir, but no stumpage shall be deducted for logs which are cut and skidded in the timber; said logs to be scaled and the quantity thereof respectively to be determined on or before March 16th, 1914, by a competent scaler, disinterested as between the parties hereto.

"(3) Said vendor shall retain possession of and operate said planing mill until June 1, 1914, and manufacture from lumber on hand and marked up to E. B. Foss & Company such white pine as shall be required to fill its contract with said company during said time, and also manufacture such western pine from the lumber marked up to the Washington Mill Company by numbers as shall be necessary to supply the lumber to said Washington Mill Company under its contract with said company during said time. All lumber on hand other than that marked up to said E. B. Foss & Company and to said Washington Mill Company shall

be inventoried and said vendees shall pay the value thereof, said value to be ascertained by the contract price of rough lumber under which said vendor has agreed to sell like lumber to the Lakeside Lumber Company at Spokane, Washington, less the freight and less fifty cents (50c) per thousand for handling at Deer Park, Washington.

"(4) Vendees are to furnish vendor necessary power to operate said planing mill until June 1st, 1914, without charge therefor, and said vendor agrees to manufacture such lumber for said vendees as they shall order at the same prices as are included in said contract between said vendor and said E. B. Foss & Company, copy of which is to be furnished by the vendor. On June 1st, 1914, all the white pine remaining on hand marked up to said E. B. Foss & Company and all western pine remaining on hand marked up to said Washington Mill Company shall be inventoried by the vendor and vendees, and said vendees shall pay for the Foss & Company lumber to said vendor the contract price with said Foss & Company, less seventy-five cents (75c) per thousand for handling, and for said Washington Mill Company lumber the contract price fixed with said Mill Company, less fifty cents (50c) per thousand for handling. It is further agreed that said vendor guarantees the grades as marked upon the said lumber to be correct and that in case it shall be found that any portion thereof falls below the grade as marked on each pile, then said vendor shall make good the same to said vendees, and in case the grade shall be better than marked, then said vendees shall make the same good to said vendor.

"(5) Said vendees have this day paid to said vendor to apply upon the purchase price of said property the sum of ten thousand dollars ($10,000). The balance of said purchase price shall be paid as follows:

"(6) Said vendees shall have twenty (20) days in which to form a corporation with a capital stock of one hundred thousand dollars ($100,000) common stock and two hundred thousand dollars ($200,000) preferred stock. From said purchase price shall be deducted the debts of said vendor existing on the 16th

day of March, 1914, amounting to not to exceed three hundred forty-five thousand dollars ($345,000); also the ten thousand dollars ($10,000) this day paid by said vendees to said vendor and for the balance of the purchase price said vendor shall receive preferred stock of said corporation to be formed as aforesaid, at par value, bearing interest at the rate of eight per cent per annum, payable annually, out of the net profits of the business of said corporation, the principal to be paid at the end of ten (10) years after date, said preferred stock to provide that any part of the same may be paid at any interest paying period, provided said corporation so to be formed shall, sixty (60) days prior to said date, give notice in writing of its election to pay the same, by paying the par value with accrued interest. The dividends upon the preferred stock shall be cumulative and at the time of the issuance and delivery to said vendor of said preferred stock said corporation shall enter into a written agreement with said vendor, whereby it shall agree that no dividends upon the common stock of said company shall be declared until the preferred stock which is issued to said vendor shall have been fully paid.

"(7) For the purchase price of the balance of the lumber on hand June 1, 1914, marked up to E. B. Foss & Company and the Washington Mill Company, a note shall be given by vendee to vendor, due nine (9) months after date, bearing interest at the rate of six per cent per annum.

"(8) It is understood and agreed between the parties hereto that said vendor holds a contract from W. C. Ufford and wife for a portion of said described real estate; also some contracts for portions of other real estate from the state of Washington; one contract from A. M. Thomas and wife for some of the said real estate and a contract from Nancy Alberthal and husband for two hundred (200) acres of said land; that said contracts shall be assigned by said vendor to said corporation so to be formed, and a good and sufficient conveyance made by said vendor to said corporation of all other of said real estate and personal property and delivered to it simultaneously with the issuance and de-

livery of said preferred stock by said corporation to said vendor. Said vendor agrees to furnish abstracts of title to all of said real estate showing good merchantable title, and in case the title to any of the real estate shall be found defective, then said vendor shall have a reasonable time in which to perfect said title. Deeds for all lands held in fee simple to contain full covenants of warranty.

"(9) It is further agreed that W. H. Short, B. Lewis, E. Enoch and B. A. Hopkins, present stockholders of said vendor, shall, at the time of said conveyance, enter into a written agreement with said corporation so to be formed, agreeing not to at any time, directly or indirectly, personally or for any other person or corporation, enter into the lumbering business at Deer Park, Washington, or at any point within twenty (20) miles thereof, for the term of fifteen (15) years from March 16, 1914.

"(10) Said vendor also agrees to convey to said corporation so to be formed all contracts for rights-of-way for said railroad which it now has without further consideration, said corporation to assume the balance due therefor; also grant to said corporation a right-of-way not to exceed one hundred (100) feet in width over and across section three (3) and the west half of the southwest quarter (W½ of SW¼) of section nine (9), all in township twenty-eight (28), north, range forty-two (42), E. W. M., the center line of which shall be surveyed by said corporation during the year 1914; said corporation to pay for the right-of-way over section three (3) at the rate of one hundred twenty-five dollars ($125) per acre, and nothing in addition thereto for the right-of-way over the west half of southwest quarter (W½ of SW¼) of said section nine (9).

"(11) The obligations of said vendor to E. B. Foss & Company and Washington Mill Company under the 1913 contracts with said parties shall not be assumed by said vendees until June 1st, 1914, when, if said remaining obligations exceed the amount of lumber then remaining from that marked up to said Foss & Company and said Washington Mill Company, the balance due shall be assumed by said new corporation and said

vendor shall surrender preferred stock held by it to that amount.

"(12) The orders for lumber received by said vendor on or before March 16, 1914, shall, on said day, be turned over to said vendees.

"(13) It is understood between the parties hereto that this contract includes only the saw-timber down to and including eight-inch tops on section seven (7), township twenty-eight (28), north, range forty-two (42), and section eleven (11) and thirteen (13), township twenty-eight (28), north, range forty-one (41), and only the pine timber on south half (S½) of southeast quarter (SE¼), section sixteen (16), township twenty-nine (29), north, range forty-two (42).

"(14) It is further agreed that said vendor shall obtain from the Netherlands American Mortgage Bank an extension of time until April 1, 1915, in which to remove the timber from section seven (7), township twenty-eight (28), north, range forty-two (42) and section eleven (11) and thirteen (13), township twenty-eight (28), north, range forty-one (41), said vendees agreeing to haul the wood on its railroad to Deer Park at thirty-five cents (35c) per cord.

"(15) It is further agreed between the parties hereto that the real estate agreed to be conveyed herein has been figured at five dollars ($5) per acre, exclusive of the timber, and has been figured at twelve thousand nine hundred ninety (12,990) acres. In case it shall not amount to that number of acres, then a proportionate reduction at that rate shall be made from the purchase price."

Plaintiff brought this action to recover the balance of the purchase price for the property sold by them to the defendants under the foregoing contract. A large shortage in the represented quantity of white pine timber and various items in dispute were pleaded by defendants in reduction of the amount claimed. Judgment was rendered for plaintiff upon findings made by the trial judge. The defendants have appealed and the plaintiff has cross-appealed. We there-

fore designate the parties as plaintiff and defendants.

Defendants make seven assignments of error which they have discussed under four heads: white pine shortage; 1913 Foss contract; 1914 Foss contract; and drop in grade and difference in prices of lumber.

I. White pine shortage: Defendants claim there is a considerable shortage of the 25,000,000 feet white pine estimate or representation. The option contained a gross price of $462,820, which was reduced some $40,000 at the execution of the contract. All statements, oral agreements and differences must have merged in the written contract at the execution thereof. It was a contract in gross as to the property and timber, except as to logs cut and lumber then manufactured, for a gross sum of $419,445. The clause following the real estate description, "Also all timber standing upon the real estate described in the list hereto annexed," does not designate any particular kind or quantity of timber sold, but all the timber standing on the real estate. Under defendants' theory we would be obliged to read something into the contract which is not there, or we would be obliged to reform it. A reformation of the contract is not at issue here. The defendants had nearly completed the cruise at the time of the execution of the contract. If they were not satisfied with the showing of the cruise, it would have been a simple matter to have inserted a guarantee of 25,000,000 feet white pine with an abatement clause as to price for a less quantity, as they did with the real estate, if such was the agreement.

In urging their case here, learned counsel assume and invite the court to hold that the sole inducement for the trade on the part of plaintiff was that there was 25,000,000 feet of white pine stumpage, and that, if the representation, if it be so called, is not sustained, they are to be relieved of the burden of the contract.

But the law must take a broader view of the transaction. It will consider the motive of the plaintiff as well as the motive of the defendant. Plaintiff had an established property. In a sense it was not a severable property. It was deeply in debt. We take it from the whole record that its object was to secure enough money or available credit through the intervention of a sale to relieve itself of its pressing necessities and a burden which might overcome it in the end. This is evidenced by the fact that there was but $10,000 in money to be paid to the plaintiff in the transaction. And giving consideration to the situation and purpose of the plaintiff, as well as the situation and purpose of the defendants, and considering the whole transaction in the light of the option and the written contract, which was made at a time when defendants knew, or might have known through their own agents, the exact amount of white pine, it follows that defendants cannot recover without disregarding established rules of law and principles of equity which have come to be as inflexible as the law.

The judgment of the court below follows the contract. We cannot say that that contract was not the contract of the parties and write into it the qualification that this is the engagement of the parties only in the event that it is found hereafter that there is in fact 25,000,000 feet of white pine upon the land. We do not understand that courts can relieve a party to an improvident contract without reforming it upon some proper ground of reformation. It was not alleged that there was any fraudulent design or mutual mistake, or that defendant had no means of protecting himself from a misrepresentation, if made, or that the property was far distant and for that reason could not be investigated, or that plaintiff discouraged an independent investigation, or that defendant had no

technical knowledge of the business of cruising lands, or any other ground that has heretofore been recognized as sufficient to sustain a rescission or reformation, either in part or in whole.

The defendants were bright young men, and the father of one of the defendants had brought an attorney from Helena, Montana, to protect their interests. An attorney from Spokane represented both parties in drafting the contract, which had been redrafted three times before execution. Even though the 25,000,000 feet white pine representation induced the purchase, it is plain that defendants did not rely upon plaintiff's representation, because they made an independent investigation by sending their cruiser to cruise the timber, who had nearly completed the cruise at the time of the execution of the contract. In *Shores v. Hutchinson,* 69 Wash. 329, 125 Pac. 142, the court said: "It is also manifest that the appellants cannot be heard to say that they relied upon any representation made by respondents or their agents. They entered upon an independent investigation and there is no evidence that they were prevented from pursuing it by any act of respondents or their agents." Defendants had knowledge that the white pine would run far short of the 25,000,000 feet estimate previous to the execution of the contract, according to their cruiser's report, and cannot now complain that the guaranty of such quantity, under a stipulated system of measurement, was not incorporated in the contract. Cruisers' estimates are often unreliable, varying from ten to fifty per cent, and cannot be considered as binding without such agreement. Evidently defendants were satisfied with the contract as it was drawn, when they signed it. At least they must be held to have been so satisfied.

Where there is a sale in gross, that is to say, where the contract considered the property as a whole with-

out any attempt to consider its elements, but for a total price, relief will not be granted for shortage where the purchaser has investigated and estimated the property before sale. We cannot hold that the defendants relied on plaintiff's representation, under the circumstances of defendants' investigation and estimation of the property, although we should hold a misrepresentation had been made. The representation must be relied on, for otherwise it does not deceive, and hence does not constitute fraud. *Sullivan v. Pierce,* 125 Fed. 104.

The trial court's findings No. 12, relating to value of white pine timber stumpage, and finding No. 13, to white pine shortage, were unnecessary for the judgment rendered and may be considered stricken.

II. 1913 Foss contract: Plaintiff alleges that the defendants refused to proceed with the 1913 contract after June 1, 1914, and that the plaintiff was therefore compelled to, and did, continue to carry out such contract, and that in so doing it was damaged. The trial court allowed them $1,523.20, being the aggregate of the commission item of $1,139.45, and the insurance item of $383.75. We think this was error. In any event, if the defendants had proceeded under the contract, this amount, under the contract, would have been charged to the plaintiff finally. Thus it will be seen that the court erred in its finding No. 6 and in finding No. 20 debiting defendants with $1,523.20 damages on the 1913 Foss contract, and crediting them with "drop in grade of lumber inventory covered by 1913 contract $2,683.64," which items should be stricken, there being nothing to support them.

III. 1914 Foss contract: We find, in referring to the contract, paragraph 2, that lumber and logs are excepted from the $419,445 and that a separate and distinct price was provided, and the trial court cor-

rectly found the logs to be of the value of $16,098.44, and that Foss & Company had advanced to plaintiff $17,203.90, with interest, on these logs. Defendants, in assuming this obligation, are therefore entitled to a credit of $1,105.46 and a difference of $65.81 interest against plaintiff, or making a debit of $16,098.44 and a credit of $17,269.71. Defendants claim that these logs were included with the other property, and that $17,203.90 with $65.81 interest on Foss indebtedness should be considered as a part of the $345,000 indebtedness mentioned in the contract, but we do not think so. This indebtedness was to be paid by the lumber sawed from the logs, while the $345,000 indebtedness was to be paid in money. This, however, is immaterial as to the outcome, if we conclude to give a money judgment in entirety.

IV. Drop in grade and price of lumber: There was in plaintiff's yard, at the time the contract was made, a quantity of fir and larch lumber on which no advances had been made and against which there was no other lien except the general lien of all of plaintiff's indebtedness. This lumber was purchased by defendants, to be inventoried and to be paid for at such price as plaintiff had agreed to sell like lumber to the Lakeside Lumber Company, less freight and fifty cents per thousand handling charges. Defendants' main contention is in regard to the grades, and claim that it ought to have been graded as No. 3 and better, instead of Nos. 1, 2 and 3, because the lumber was all intermingled in the piles and that they would have to sell it as No. 3; but we believe that separation can easily be made at the time of shipment, and think the trial court was right on this proposition. This brings us to plaintiff's appeal.

Its assignment of errors are: (1) That the amount of judgment should be $97,828.26 and interest; (2) that

plaintiff is entitled to a money judgment for the amount found payable at once, instead of a judgment providing that a part thereof shall be payable in the future and evidenced by obligations of the defendants of the form set out in the judgment. What we have already said will dispose of the first assignment, and we will, therefore, proceed with the second. The contract provided that from the purchase price shall be deducted the debts of the vendor existing not to exceed $345,000, also $10,000 paid by vendees, and for the balance of the purchase price the vendor shall receive preferred stock of the corporation to be formed by vendees, with interest at eight per cent, principal to be paid at the end of ten years, etc. No time was provided when this stock security was to be delivered. The trial court found that it was intended that this preferred stock was to constitute an absolute promise to pay such sum on March 6, 1924, with interest from March 6, 1914, at eight per cent per annum, payable annually out of the net profits of the business of the defendant corporation, and that no dividends should be paid on the common stock until this obligation had been fully paid. The defendants failed and refused to deliver any preferred stock or any evidence of indebtedness as provided in the contract.

Where property is sold, to be paid for at a future time, no suit can, as a general rule, be brought on the promise to pay until the time stipulated; but where the purchaser agrees to give security for the deferred payment, and fails to do so, a suit may be maintained for the breach of the agreement to give the security; and in such action the damages are the value of the security agreed upon—*prima facie,* the amount of the sum to be secured. *Rinehart v. Olwine,* 5 Watts &

Serg. (Pa.) 157; *Hanna v. Mills,* 21 Wend. (N. Y.) 90, 34 Am. Dec. 216; *Barron v. Mullin,* 21 Minn. 374.

For the breach of an agreement to execute a promissory note payable in the future, damages may be recovered presently, and the amount for which the note was to be given will be the *prima facie* measure of such damages. *American Manufacturing Co. v. Klarquist,* 47 Minn. 344, 50 N. W. 243; *Deering v. Johnson,* 86 Minn. 172, 90 N. W. 363; *Bowman v. Branson,* 111 Mo. 343, 19 S. W. 634.

We are of opinion that plaintiff was entitled to a money judgment in entirety. We think that finding No. 20 should be changed to read as follows: That the balance owing to the plaintiff from the defendants is the sum of ($92,732.32) ninety-two thousand seven hundred thirty-two and 32-100 dollars.

In arriving at this figure, the defendants are charged with the following amounts:

Contract price for mill property, standing timber and real estate	$419,445.00
Lumber inventory	16,995.15
Logs	16,098.44
Total	$452,538.59

Credit the defendants with the following:

Paid on contract, cash	$10,000.00
Open account	2,463.84
1914 Foss advancement with interest	17,269.71
Debts paid and assumed	329,176.57
Land rebate	516.15
Taxes on lumber, 1913, Foss contract	380.00
	$359,806.27
Judgment	92,732.32
Total	$452,538.59

The written contract of conveyance provided that the evidence of indebtedness should bear interest at the rate of eight per cent per annum from the 6th day of March, 1914. The plaintiff will recover judgment for $92,732.32, with interest at the rate of eight per cent per annum from March 6, 1914, until paid.

For the foregoing reasons, the cause is remanded to the trial court for modification in conformity herewith. It is so ordered. Neither party will recover costs in this court.

[No. 14933. Department Two. October 16, 1918.]

THE STATE OF WASHINGTON, *on the Relation of George Chandler, Plaintiff*, v. I. M. HOWELL, *as Secretary of State et al., Respondents.*[1]

UNITED STATES (2) — MEMBERS OF CONGRESS — QUALIFICATIONS — STATE REGULATIONS. The Federal Constitution, art. 1, §§ 2 and 5, providing the qualifications of members of Congress and that Congress shall be the sole judge thereof, cannot be added to or varied by the state Constitution, art. 4, § 15, which provides that judges of the supreme and superior courts shall be ineligible to any other office or employment other than a judicial one during the term for which they have been elected.

SAME (2). The fact that the state, in the absence of Federal legislation, can provide for primary elections, does not give it power to provide the qualifications of those seeking nomination for membership in Congress at such primary elections.

Petition filed in the supreme court August 16, 1918, for a writ of prohibition to prohibit the secretary of state from printing the name of a Congressional candidate upon the primary election ballot. Denied.

[1]Reported in 175 Pac. 569.

William A. Monten and *W. W. Black*, for relator.

The Attorney General, and *Jno. A. Homer, Assistant*, for respondent Howell, contended that Congress is the exclusive judge of the qualifications of its members, and the courts are without jurisdiction to inquire into such qualifications. Cooley, Constitutional Limitations, pp. 189, 190; Hinds, Precedents, vol. 1, pp. 385, 388; Congressional Globe, part 1, 1st session, 34th Congress, pp. 548, 565, 1580; Story, Commentaries on the Constitution, §§ 626, 627.

The states cannot add anything to the qualifications of congressmen. *Spier v. Baker*, 120 Cal. 370, 52 Pac. 662; Cooley, Constitutional Law (3d ed.), pp. 285, 290.

Lester M. Livengood, for respondent Webster.

MACKINTOSH, J. — The term of Judge J. Stanley Webster, as a justice of the supreme court of this state, would expire on January, 1921. In May, 1918, he resigned his position on the bench and became a candidate for the office of representative in Congress for one of the Congressional districts of this state, and filed with the secretary of state his declaration of candidacy. The relator seeks to enjoin the printing of Judge Webster's name on the ballot for the primary election, contending that he is rendered ineligible to hold the office of representative in Congress by article 4, § 15 of the state constitution, which provides that judges of the supreme court and of the superior court shall be ineligible to any other office or employment during the term for which they shall have been elected.

In deciding this case but one question arises for determination: Can a state, in its constitution, change the qualifications fixed by the Federal constitution for members of either house of Congress? Article 1, § 2 of the Federal constitution provides: "No person shall

be a representative who has not attained the age of twenty-five years, and been seven years a citizen of the United States and who shall not, when elected, be an inhabitant of that state in which he shall be chosen." Section 5 of the same article provides that each house of Congress shall be the sole judge of the qualifications of its own members. The office of a member of Congress is created by the Federal constitution, and that instrument is the only one which attempts in terms to specify the qualifications necessary to be possessed by an occupant of the office. To allow the several states to add to or vary the qualifications set forth in the Federal constitution would be to allow the several states to determine the qualifications of the members of Congress, which power, by the Federal constitution, is expressly delegated to the respective houses of Congress. So long as a candidate for membership in Congress meets the requirements set forth in the constitution which created the office, no state has the right or authority to prevent his candidacy, either by provisions in its constitution or in its statutes. The state courts may be authorized to determine the eligibility of a candidate and may prevent the certification of an ineligible candidate, but the test of eligibility must be that laid down in the Federal constitution.

The relator lays stress upon the fact that the election from which he is seeking to have the candidacy of Judge Webster eliminated is a primary and not a general election, and that the nomination of candidates for Congress is a matter of state regulation, citing the case of *State ex rel. Zent v. Nichols,* 50 Wash. 508, 97 Pac. 728; *United States v. Gradwell,* 243 U. S. 476, and that Congress having passed no act providing for the machinery for the nominations of its members, that the matter of nominations is within the control of the state. *United States v. O'Toole,* 236 Fed. 993. All of

this we concede, but the fact that the state, in the absence of Federal legislation on the subject, has the authority to provide the manner and means of primary elections does not give the state the authority to determine the qualifications of those seeking nomination for membership in Congress at such elections. When the state of Washington attempted in its constitution to prevent members of its courts from becoming candidates for any office, other than a judicial one, during the terms for which they were elected, it came in conflict with the Federal constitution, in so far as it thus attempted to impose additional qualifications for membership in Congress, and in so far that provision is inoperative and void. For offices created by the state, the state, by its constitution and statutes, may provide such qualifications and restrictions as it deems proper, but for offices created under other authority we must look to the creating authority for all qualifications and restrictions.

Some reliance has been placed upon language used by this court in the case of *State ex rel. Reynolds v. Howell*, 70 Wash. 467, 126 Pac. 954, 41 L. R. A. (N. S.) 1119, as sustaining the contention that a judge, upon assuming his office, agrees to the constitutional provisions. But it must be remembered that the oath which the judge takes is not only one of allegiance to the constitution of the state but the Federal constitution as well, and where those constitutions are in conflict, the first duty is to the superior authority. It is true that, in the case just referred to, language broader than was necessary to its decision is used in the opinion, but the decision of that case is only that a member of the court cannot, during the term for which he is elected, become a candidate for any office created by the constitution or laws of this state, other than a judicial office.

Congress, in the exercise of the authority given it to determine the eligibility of its own members, has passed upon this same question in contests arising over membership in Congress from states having similar constitutional provisions to that contained in our constitution. The constitution of Illinois provides that judges should not be eligible for any office "in this state or the United States during the terms for which they are elected, nor for one year thereafter." In 1856, one Marshall, a judge, was elected from Illinois to the house of representatives, and one Trumbull, a judge, was elected by the legislature of Illinois to the United States senate. Both the house and the senate in deciding these cases held that the Illinois constitutional provision was null and void in so far as it applied to the office of United States senator and representative, and that no state could add to the qualifications of those offices as they were fixed in the Federal constitution. 1 Hinds, Precedents, page 385.

The constitution of Kansas contains a provision practically the same as that of the Illinois constitution, and in 1884 the house of representatives reaffirmed the decision in the Trumbull case and seated one Peters, who had been a member of the state court. 1 Hinds, Precedents, page 388.

These decisions by Congress, in the exercise of the power given it by the Federal constitution, are binding upon the state courts. Story in his Commentaries on the Constitution, vol. 1 (5th ed.), §§ 626, 627, observes:

"Now, it may properly be asked, where did the states get the power to appoint representatives to the national government? Was it a power that existed at all before the constitution was adopted? If derived from the constitution, must it not be derived exactly under the qualifications established by the constitution, and none others? If the constitution has delegated no power to the states to add new qualifications,

how can they claim any such power by the mere adoption of that instrument, which they did not before possess?

"The truth is, that the states can exercise no powers whatsoever which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. They have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a President. Each is an officer of the Union, deriving his powers and qualifications from the constitution, and neither created by, dependent upon, nor controllable by the states. It is no original prerogative of state power to appoint a representative, a senator, or President for the Union."

In Kent's Commentaries, page 228, note f, we read:

"The question whether the individual states can superadd to, or vary the qualifications prescribed to the representative by the constitution of the United States, is examined in Mr. Justice Story's Commentaries on the Constitution, vol. 1, pages 99 to 103, but the objections to the existence of any such power appear to me to be too palpable and weighty to admit of any discussion."

So, also, Judge Thomas M. Cooley, in his General Principles of Constitutional Law (3d ed.), pages 285. 290, remarks:

"The constitution and laws of the United States determine what shall be the qualifications for Federal offices, and State constitutions and laws can neither add to nor take away from them. This has been repeatedly decided in Congress, in the case of persons elected to seats therein when provisions in the state constitution, if valid, would render them ineligible.

. . .

"Legislative elections are determined by the body for a seat in which the election is had. This is expressly provided by the constitution in the case of the two houses of Congress, and the judiciary can in no manner interfere with their conclusions."

Article 4, § 15, constitution of this state, does not apply to membership in either house of Congress.

The petition will be denied.

MOUNT, HOLCOMB, FULLERTON, and PARKER, JJ., concur.

[No. 14445. Department One. October 23, 1918.]

J. C. LEMLEY *et al.*, *Appellants*, v. C. W. JONES *et al.*, *Respondents*.[1]

WATERS AND WATER COURSES (56)—LAKES OR SURFACE WATERS, DRAINAGE OR DISCHARGE. The owner of land has no right to remove a natural barrier and permit the waters of natural lakes on his land, with the spring accumulations from rain and snow, to escape and be discharged upon the lower lands of an adjoining owner.

SAME (70)—CONTRACTS—LICENSES (17)—REVOCATION. A verbal license to remove a natural barrier and permit natural lakes and surface accumulations to be discharged upon the lower lands of an adjoining owner is revocable at the will of the licensor, although money has been expended thereon.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered January 4, 1917, upon findings in favor of the defendants, dismissing an action for an injunction, tried to the court. Reversed.

Guy T. Walter and *N. W. Washington*, for appellants.

MAIN, C. J.—This action was brought to obtain an injunction. The cause was tried to the court without a jury, the relief prayed for was denied, and a judgment entered dismissing the action. From this judgment, plaintiffs appeal.

The parties to this action are, respectively, the

[1]Reported in 176 Pac. 4.

owners of adjoining farms or tracts of land in Douglas county. Upon the respondents' land, there is a body of water known as Tule lake, which covers an area varying with the seasons of the year from fifteen to twenty-five or thirty acres. To the northwest of this lake is a series of smaller lakes which many years ago were connected with each other and with Tule lake by means of a ditch. Beyond the series of smaller lakes is a natural barrier. During the spring season, when the waters in Tule lake and the other lakes rise owing to the rains and melting snows, the waters overflow this natural barrier and continue in a course until they reach the land owned by the appellants. Some distance beyond the natural barrier, and on the land of the respondents, is the head of what is called a gulch, which extends to or upon the land of the appellants. The respondents cut through or lowered the natural barrier above referred to so that the waters of Tule lake would pass through, reach the gulch, and finally flow upon the land of appellants. By this action, the appellants sought to restrain the lowering of the natural barrier and thus permitting the waters of Tule lake to reach their land, which otherwise would not have done so.

In *Noyes v. Cosselman,* 29 Wash. 635, 70 Pac. 61, 92 Am. St. 937, it was held that an owner of land upon which there was a natural accumulation of water into a swamp or lake had no right to improve his land by draining such waters from one portion of his land through a natural barrier to another portion, whence it would escape over the lower lands of an adjoining proprietor. It is said, however, and the trial court found, that the lowering of the barrier in the present case was orally agreed to. While the evidence as to whether such an oral agreement was made is in dis-

pute, we will assume that the facts on this question are as found by the trial court. In *Hathaway v. Yakima Water, L. & P. Co.*, 14 Wash. 469, 44 Pac. 896, 53 Am. St. 874, it was held that a verbal license to enjoy a permanent privilege on the land of another is revocable at the will of the licensor, although money may have been expended thereunder by the licensee.

From the two cases cited, it seems to necessarily follow that appellants had a right to injunctive relief to prevent the waters of Tule lake from flowing upon their land, which was the result of the lowering of the natural barrier.

The judgment will be reversed, and the cause remanded with direction to enter a judgment in favor of the appellants.

PARKER and FULLERTON, JJ., concur.

[No. 14379. *En Banc.* October 30, 1918.]

MOUNT VERNON NATIONAL BANK, *Appellant*, v. FIRST NATIONAL BANK OF MONROE, *Respondent*, J. W. MCCORMICK *et al.*, *Defendants*.[1]

JUDGMENT (118)—VACATION—NATURE AND FORM OF PROCEEDING. The vacation of a default judgment for mistake and inadvertence in properly noting the return day may be had on motion, and need not be by petition as provided in Rem. Code, § 467.

SAME (41, 99)—DEFAULT—VACATION—DISCRETION. It is not an abuse of discretion to vacate a default judgment on account of mistake and inadvertence of the cashier of defendant bank in making a note of the return day beyond the time when an answer should have been made, and the mistake of the clerk in filing the answer in another cause.

SAME (29)—DEFAULT—WAIVER. Acceptance of the $25 paid as a condition for the vacation of a default judgment estops the plaintiff from contesting the order of vacation.

[1]Reported in 176 Pac. 13.

Appeal from an order of the superior court for Snohomish county, Alston, J., entered May 10, 1917, vacating a default judgment, after a hearing before the court. Affirmed.

Shrauger & Henderson, for appellant.

J. A. Coleman and *James M. Hogan,* for respondent.

MOUNT, J.—This appeal is from an order of the trial court vacating a judgment taken by default against the First National Bank of Monroe. The plaintiff has appealed.

It appears that the appellant brought an action against the defendants McCormick and Thompson to recover a balance due upon a promissory note. At the time the action was brought, the appellant applied for a writ of garnishment, and such writ was issued and served upon the First National Bank of Monroe on the 11th day of December, 1916. At the time of the service of the writ, the cashier of the respondent bank noted upon a desk pad the time when he should file an answer. By inadvertence and mistake, this date was after the date required by law when the answer should be made. When the twenty days expired for answer, the appellant applied for a default judgment against the respondent. A judgment was entered for the full amount claimed against the defendants in the original action. The respondent, having no notice of the default action, prepared and filed an answer denying any indebtedness or any property under its control belonging to the defendants in the original action. This answer, by mistake of the clerk, was filed in another case. Thereafter the respondent was notified that a judgment had been entered, and immediately filed a motion to vacate the judgment upon the grounds of inadvertence, mistake and excusable neglect. This motion was based

upon an affidavit stating the facts substantially as above, and also showing that an answer had been filed denying any liability. The affidavit also showed that, prior to the time the answer was filed, a copy thereof was mailed to the attorneys for the appellant. The attorneys for the appellant, however, denied that they had received a copy of the answer. This motion was heard by the trial court and an order was made vacating the default, setting aside the judgment and permitting the answer of the respondent to be filed. This order was made conditional upon the payment of $25 by the respondent to counsel for the appellant. The $25 was paid and was received by counsel for the appellant.

The appellant makes two contentions here, to the effect, first: That the court had no jurisdiction to set aside the judgment, by motion, upon the grounds stated; and second, that the court abused its discretion in vacating the judgment. It is argued by the appellant that the proper procedure was the one provided for in § 467, Rem. Code, by petition, and not by motion. In the case of *Spokane & Idaho Lumber Co. v. Stanley*, 25 Wash. 653, 66 Pac. 92, we had occasion to consider this question, and there held that, in cases of this character, the court had jurisdiction and that a motion to vacate a judgment upon the grounds here stated was a proper proceeding. It is unnecessary to further consider this question.

It is next argued that the court abused its discretion in setting aside the judgment. The statute, at Rem. Code, § 303, provides that the court may, upon such terms as may be just, and upon payment of the cost, relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. The facts in the case are not disputed, and we think there is no merit in the contention

that the court abused its discretion in vacating the judgment. If the appellant did not owe the defendants in the original action, it was clearly the duty of the court, under the circumstances, which are not disputed, to permit a trial of that question.

Another sufficient reason for affirmance is the fact that the judgment was vacated upon condition of the payment of $25. This was paid by respondent and received by counsel for appellant, which was thereby estopped from contesting the order.

Affirmed.

All concur.

[No. 14395. Department Two. October 30, 1918.]

FRANCES KNOLL, *Appellant*, v. JOSEPH KNOLL, *Respondent*.[1]

MARRIAGE (5)—PERSONS WHO MAY MARRY—DIVORCED PERSON. A marriage within the six months prohibited by the divorce, outside of the jurisdiction where the parties went for that purpose and immediately returning without intent to change their domicile, is void.

SAME (17)—ANNULMENT—GROUNDS—MISTAKE OF LAW AND FACT. Where plaintiff in a divorce case, after trial believed in good faith that a decree of divorce was entered, and within six months married in a foreign jurisdiction honestly believing that such marriage would be valid, her mistake of fact and law was in no sense meretricious, and authorizes the court to annul the marriage at her suit.

SAME (21)—ANNULMENT—PROPERTY RIGHTS. Upon the annulment of a void marriage, in no sense meretricious but entered into in good faith, the courts will treat the relation as a partnership as to all property acquired by the joint efforts of the parties while living together as husband and wife, the wife having assisted in the business, earned part of her personal expenses, and faithfully performed the duties of a housewife.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered June 16, 1917,

[1]Reported in 176 Pac. 22.

upon findings favorable to the defendant, in an action for divorce, tried to the court. Reversed.

Noah Shakespeare and *Louis A. Merrick,* for appellant.

Coleman & Fogarty and *Q. A. Kaune,* for respondent.

MAIN, C. J.—The purpose of this action, as originally brought, was to secure a divorce. An amended complaint was filed in which it was alleged that the marriage contract between the parties was void, but entered into in good faith. The defendant answered and, among other things, alleged affirmatively that the plaintiff, at the time the marriage ceremony here sought to be annulled was performed, had not been legally divorced from a former husband. The affirmative defense was denied by a reply. The cause in due time came on for trial before the court, and at the conclusion of the plaintiff's evidence, the defendant moved that the action be dismissed. The court declined to dismiss the action, but indicated that a judgment would be entered annulling the marriage, which judgment the defendant did not resist. The plaintiff, in her amended complaint, had not only asked for an annullment of the marriage, but the custody of two minor children—one a natural child, born as a result of the marriage, and the other an adopted child—and also for a division of the property which had been acquired subsequent to the marriage. The decree annuls the marriage, but makes no adjudication as to the property rights or the custody of the children. The failure to mention the children in the decree was doubtless due to an oversight, because the defendant conceded the right of the plaintiff to the custody of them, and in one of the conclusions of law which follow the findings, it is recited that the plaintiff is en-

titled to the care and control of the children. From the decree entered, the plaintiff appeals.

The controlling facts may be stated as follows: On the 20th day of March, 1899, the appellant, being then the wife of one Henry V. Coles, instituted an action in the superior court of King county, Washington, for a divorce. The defendant in that action, though personally served, defaulted. The cause was tried on the 17th day of April, 1899, the prosecuting attorney appearing in the action. At the conclusion of the evidence, the court orally announced that a decree for the plaintiff would be granted. No decree was in fact entered until the 8th day of October, 1906. The trial judge before whom the cause was tried had long prior to this time retired from the bench, and the judge who signed the decree had no knowledge of the cause except that disclosed by the record.

On June 14, 1899, the parties to the present action were married in Vancouver, British Columbia, and immediately thereafter returned to the state of Washington. They went to Vancouver solely for the purpose of having the marriage ceremony performed and with the intention of immediately returning to the state of their domicile. They had no thought of changing their domicile to the jurisdiction where the marriage ceremony was performed. Soon after returning from Vancouver, they took up their residence in Everett, where they resided together until a short time before the present action was begun, sometime during the early part of the year 1917.

The plaintiff in this action did not know that no formal decree had been entered in the former divorce action prior to the time that the parties to this action entered into the contract of marriage, and in fact did not know that there was any question about the validity of the decree in the prior action until after the present

action was instituted. The fault, apparently, was due to the failure of her attorney in that action to prepare findings, conclusions and a decree and have them signed and entered.

The parties to this action, as above stated, shortly after the marriage ceremony was performed in Vancouver, went to Everett, where the respondent engaged in the saloon business. During a portion of the time he was so engaged, the appellant helped prepare the free lunches that were served in the saloon. During a large portion of the time they lived together, the appellant worked as a seamstress. The property acquired during the time the parties lived together is in the name of the respondent. The evidence shows that, while the parties went to Vancouver to have the marriage ceremony performed and knew that they had no right to be married at the time in the state of Washington, they believed that the marriage performed in Vancouver, being legal there, would also be valid in the state of Washington.

Much argument appears in appellant's brief in an endeavor to establish the validity of the decree entered in the former action, but we shall not review this argument nor the authorities cited. Even though a valid decree had been entered on the 17th day of April, 1899, the marriage ceremony in Vancouver, having been performed within six months from that date, would be void in this jurisdiction, the parties having gone there solely for the purpose of being married and with the intention of immediately returning to the state of Washington, and having had no intention of changing their domicile. *Pierce v. Pierce,* 58 Wash. 622, 109 Pac. 45; *Peerless Pacific Co. v. Burckhard,* 90 Wash. 221, 155 Pac. 1037, Ann. Cas. 1918B 247, L. R. A. 1917C 353. The fact that the marriage ceremony per-

formed in Vancouver may also be void for another reason would not affect the situation here.

The controlling question upon this appeal, as it seems to us, is whether the marriage here sought to be annulled was entered into and kept in good faith by the appellant and was in no sense meretricious. The record shows that the appellant believed she had been legally divorced from her former husband, and the fault in failing to have the decree rendered was not hers, but that of her attorney in that action. As to the effect of that proceeding, the appellant, at the time she entered into the marriage contract with the respondent, was in good faith acting under a mistake of fact. In going to Vancouver to be married for the purpose of circumventing the laws of this state, the appellant, in good faith, believed that such marriage there performed would constitute the parties thereto legally husband and wife in the state of Washington, notwithstanding the fact that the marriage ceremony could not be performed here until six months after former divorce. It thus appears that the appellant's good faith rested both in mistake of fact and mistake of law. The fact that the appellant knew that she had no right to be married in the state of Washington, but believed that she had a right to be married in a foreign jurisdiction and that such marriage would be valid here, does not make the contract of marriage meretricious nor taint her relation with the respondent with conscious guilt. Such good faith, whether resting in mistake of fact or mistake of law, is enough to authorize the courts, in an action brought for the annullment of the marriage, to treat the relation as a partnership as to all property acquired by the joint efforts of the parties. *Buckley v. Buckley,* 50 Wash. 213, 96 Pac. 1079, 126 Am. St. 900; *Lawson v. Lawson,* 30 Tex. Civ. App. 43, 69 S. W. 246; *In re Brenchley's*

Estate, 96 Wash. 223, 164 Pac. 913, L. R. A. 1917E 968. In the case last cited, this court quoted approvingly from the *Lawson* case as follows:

"In *Morgan v. Morgan,* 1 Texas Civil Appeals, 315, Justice Head, in his discussion of the principles under which the putative wife acting in good faith might have her just rights secured to her, entered into a thorough review of the authorities and held that the tendency of our courts, as evidenced by the decisions involving kindred questions, justified the conclusion that she should be treated as a partner as to all property shown to have been acquired by their joint efforts."

The record now before us shows that, during the time the parties lived together, property was acquired by their joint efforts. For a time the appellant assisted in preparing the lunches which were served in the saloon, of which the respondent was a part owner, and during much of the time that they lived together she worked as a seamstress. It is said, however, in the respondent's brief, that the money earned as a seamstress was spent by the appellant for her personal expenses. But, if the appellant had not provided for her personal expenses, the respondent would have been under the necessity of providing therefor, and his savings would have been depleted to that extent. In addition to this, the appellant performed all the duties of a housewife faithfully. So long as the parties lived together as husband and wife, both labored in their respective fields, and the property acquired during this time was the result of their joint efforts.

This requires a reversal of the judgment upon the question of the acquisition and the proper disposition to be made of the property. The respondent has had no opportunity to be heard upon this question. At the conclusion of the appellant's evidence, the court announced that the marriage would be annulled, but that

no judgment would be rendered upon the property rights. This judgment was acquiesced in by the respondent, and consequently there was no occasion or opportunity for him to offer testimony on the question.

The judgment will be reversed, and the cause remanded with directions to the superior court to proceed as herein indicated.

HOLCOMB, MOUNT, and CHADWICK, JJ., concur.

[No. 14788. Department Two. November 6, 1918.]

KOSTAS PAPPAS, *Respondent*, v. GENERAL MARKET COMPANY, *Appellant*.[1]

TROVER AND CONVERSION (13)—DEFENSES—RESTORATION OR TENDER—TENDER OF PROPERTY. A mere direction to the owner of property to remove it from defendant's place of business where it was stored is not a tender that would absolve the wrong, and there was a conversion, where defendant afterwards sold and delivered the property to a third person, on account of plaintiff's failure to comply with the demand for removal.

FRAUDS, STATUTE OF (11)—LEASES—MORE THAN ONE YEAR. A lease for one year, although executed within the month prior to its taking effect, is not a lease for more than one year, within Rem. Code, § 8802, requiring such leases to be acknowledged.

LANDLORD AND TENANT (87) — EVICTION — ACTS CONSTITUTING — AGREEMENTS. A market stall tenant cannot recover for eviction, if, being unable to pay rent, he agreed to move into a cheaper stall prepared for him, and refused to vacate on notice to quit.

Appeal from an order of the superior court for King county, Frater, J., entered November 21, 1917, granting a new trial, after the verdict of a jury rendered in favor of the plaintiff by direction of the court, in an action in tort. Affirmed.

[1]Reported in 176 Pac. 25.

Tucker & Hyland, for appellant.
Ryan & Desmond, for respondent.

CHADWICK, J.—This action was brought to recover damages for the unlawful eviction of respondent from a stall, known as stall No. 106, in the Westlake Public Market, in the city of Seattle.

Respondent held under a lease executed on the 12th day of October, 1916, for a term of one year commencing November 1, 1916. The lease was not witnessed or acknowledged. In April, 1917, appellant gave notice to quit, which being ignored by respondent, it removed his goods, fixtures, cash register and scales and stored them in another part of the building. It then notified respondent "to remove at once the fruit and other goods belonging to you, which we have in storage. If you fail to remove these goods by 6 p. m. on May 8, 1917, it will become necessary for us to dispose of the perishable fruit and produce, and if not removed we will sell to the best advantage during the forenoon of May 9th, all perishable goods belonging to you held in storage in our building." Respondent did not remove the goods, and appellant thereafter sold the perishable stock for $85. Respondent then brought this action for the value of the stock, which is alleged to have been $300; for the loss of prospective profits for the unexpired term, which are alleged to be $1,225; for $65, being rent prepaid for the last month of the term, and for $42.50, alleged to have been collected by appellant on c. o. d. deliveries made by it through its delivery system and unaccounted for. The items, fixtures, cash register, scales and nonperishable stock were eliminated on the trial by agreement of the parties. Appellant denied all damages claimed as prospective profits, denied that the stock was of greater value than $85, and made

tender of the $85, the $65 rent prepaid, and $35.05 which it admitted that it had collected on c. o. d. deliveries. The case went to trial with a jury. At the close of the case, the court instructed the jury to return a verdict in favor of respondent for the amount tendered. The court granted a motion for a new trial, and this appeal follows.

The trial judge so ruled on the trial because he was convinced that there had been no conversion in law of the goods and that the testimony concerning profits was remote and speculative.

We are informed that the motion for a new trial was general (it is not a part of the transcript), and we find that the order granting the motion is general in terms. Counsel concede that, under such circumstances, this court will not ordinarily review an order granting a motion for a new trial, but contend that the order cannot be sustained for the reason that, the nonperishable property having been accepted at the trial, there is no evidence on which to base a judgment other than for the amount of the tender. This contention presupposes that there was no conversion in law, and that the testimony as to profits would not sustain a verdict.

Counsel maintain that there was no conversion of the goods because respondent refused to accept them although tendered. But manifestly the direction to respondent to remove his goods from the place of storage, appellant's place of business, was not a tender; granting, but without deciding, that a conversion can be so excused by a tender as to absolve the wrong to the extent that no incidental or consequential or even nominal damages may be recovered. 38 Cyc. 2102. A tender demands the actual production of the thing to be paid or delivered and a present delivery if accepted. No cases have been cited, and we

doubt that there are any, which hold that an invitation to come and get property which has been converted is sufficient to satisfy the law of tender. This is the distinguishing point in the case of *Browder v. Phinney,* 37 Wash. 70, 79 Pac. 598, which is relied on by appellant. We think, too, that the case of *Mattice v. Brinkman,* 74 Mich. 705, 42 N. W. 172, may be distinguished. In that case the goods were retained by the defendant and were subject to the call of the plaintiff; while here, as in *Gibbons v. Farwell,* 63 Mich. 344, 29 N. W. 855, 6 Am. St. 301, which is there distinguished, the defendant delivered the goods to a third party so that the goods were lost to the plaintiff. If the goods had been retained in this case and the suit of respondent had been met by a disclaimer of property and tender to return, a different case would be presented. As it is, there was a conversion (*Bickford v. Hupp,* 83 Wash. 427, 145 Pac. 454), and the value of the property sold is a material issue.

Whether the testimony is sufficient to sustain a verdict for lost profits we do not now decide. It is not entirely satisfactory, but we may not anticipate the testimony on a retrial. Among our own cases bearing upon this subject and which should be considered, keeping in mind that no very certain rule can be laid down—for the rule, as well as its exceptions, depends upon the facts of each particular case—are: *Andreopulos v. Peresteredes,* 95 Wash. 282, 163 Pac. 770; *Matzger v. Arcade Building & Realty Co.,* 102 Wash. 423, 173 Pac. 47; *Risdon v. Hotel Savoy Co.,* 99 Wash. 616, 170 Pac. 146; *Seidell v. Taylor,* 86 Wash. 645, 151 Pac. 41; *Webster v. Beau,* 77 Wash. 444, 137 Pac. 1013, 51 L. R. A. (N. S.) 81.

Appellant contends that the lease is one for a term of more than one year, and being unacknowledged is, therefore, evidence of a tenancy of no more than from

month to month. The lease, by its terms, is a lease for one year and no more. The fact that it was executed within the month prior to its taking effect would not affect the term. It is the term, and not the time of the execution of the lease, of which the statute, Rem. Code, § 8802, takes account.

Appellant, however, sets up as a defense that, respondent being unable to pay the rent agreed upon, the parties mutually agreed that appellant should prepare a stall at a lower rent and that respondent would move into it; that it performed its part of the contract; that respondent refused to vacate when called upon to do so; that it then gave notice to quit, which being ignored, it moved respondent's stock into the new stall; that respondent moved the stock back, whereupon it did the things charged against it. Respondent makes denial of any such agreements. Whether he did so agree is a question of fact. If he made such agreement he must be bound by it, and if the jury should so find, the court will direct it to allow nothing for profits lost by reason of his eviction from stall 106.

The judgment is affirmed.

MAIN, C. J., HOLCOMB, MOUNT, and MACKINTOSH, JJ., concur.

[No. 14020. *En Banc.* November 13, 1918.]

NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*, v. C. M. LONGMIRE, *Respondent*.[1]

EVIDENCE (68) — BEST AND SECONDARY — FACTS EVIDENCED BY WRITINGS. The continuous interstate shipment of live stock may be shown by the testimony of a witness accompanying the shipment, in the absence of the original waybills, which cannot be regarded as the better evidence.

CARRIERS (7) — DISCRIMINATION — CONTRACTS VIOLATING REGULATIONS—POSTING TARIFFS. Since an interstate carrier's failure to post its tariffs, as required by U. S. Compiled Statutes, 1916, § 8569, would defeat the purpose of the act to prevent discrimination in rates, posting need not be proven in an action to collect the difference between the rates actually charged and the carrier's tariffs filed with the interstate commerce commission.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered September 18, 1916, upon granting a nonsuit, dismissing an action by a carrier to recover the published tariff rates for an interstate shipment of live stock. Reversed.

Rigg & Venables, Geo. T. Reid, J. W. Quick, and *L. B. da Ponte,* for appellant.

H. J. Snively, for respondent.

TOLMAN, J.—Appellant sues to recover the difference between the amount actually collected for freight on five cars of sheep shipped from Terre Bonne, Oregon, to Seattle, Washington, and the rate as fixed by the joint tariffs on file with the interstate commerce commission covering such services, which it alleges it is required as an interstate carrier to collect.

Appellant is a common carrier operating a line of railway from Wallula, Washington, to Seattle, Washington, via. North Yakima, and the Oregon-Washing-

[1]Reported in 176 Pac. 150.

ton Railway & Navigation Company is a common carrier operating a like line between Terre Bonne, Oregon, and Wallula, Washington. About the 13th day of October, 1912, respondent shipped from Terre Bonne five carloads of sheep consigned to Frye & Company, Seattle (in six cars, however, four being double decked and two single decked), and accompanied the shipment himself, making a continuous trip to the end of the Oregon-Washington Railway & Navigation Company's line at Wallula, where the cars were turned over to appellant, and proceeding from there without unloading them and with only a few hours' delay necessitated by train schedules to North Yakima, where the sheep were unloaded for grazing in accordance with the interstate commerce law and in pursuance with respondent's wishes or orders.

When the sheep were delivered to appellant at Wallula, the usual live stock contract was entered into between respondent and appellant, which is in evidence and shows that the shipment had its inception at Terre Bonne, Oregon, was destined to Frye & Company, Seattle, and gives the numbers of the waybills and the car numbers and initials.

Subsequently respondent sold his billings to Frye & Company of Seattle, and substantially the same number of sheep were shipped on from North Yakima to Seattle in cars furnished by appellant for that purpose. Respondent paid to appellant's agent at North Yakima the sum of $435 as being the entire freight charge upon the five cars of sheep from Terre Bonne, Oregon, to Seattle, Washington. The freight rate, as established by the joint tariffs of the Oregon-Washington Railway & Navigation Company and the appellant on file with the interstate commerce commission, fixed the charge for this service at $650, and

upon discovering the mistake or undercharge, this action was brought to recover the difference of $215.

On the trial below, the appellant offered evidence to show the continuous shipment, the transfer from one line to the other, the signing of the live stock agreement, and, by its records, traced the shipment to its unloading for grazing purposes at North Yakima and the later reshipment to Seattle. It showed the payment of $435 as the supposed full charge for the service, and introduced the printed tariff sheets with the certificate of the secretary of the interstate commerce commission showing the same to be the schedules on file with the interstate commerce commission and in effect at the time of the shipment referred to, from which it appears that the freight charges for the service rendered to respondent were $650. Appellant did not offer in evidence the original live stock contract or the waybills issued by the Oregon-Washington Railway & Navigation Company at Terre Bonne, Oregon. No evidence was offered by the respondent. The trial court entered a judgment dismissing the action with prejudice, and this appeal follows.

Appellant contends that the trial court held that there was no evidence, in the absence of the original waybills, to establish the continuous interstate shipment, and, therefore, no proof that the rates fixed by the tariffs on file with the interstate commerce commission should apply. The testimony of respondent, who was called as a witness by appellant, together with the records introduced, establishes the interstate character of the shipment; and while the waybills might have been admissible for that purpose, we see no reason why they should be regarded as better evidence than the testimony of one who accompanied the

shipment. The supreme court of Oregon, after a careful review of the authorities, has recently said:

"The doctrine to be drawn from all these decisions is that a bill of lading is not conclusive of the character of the shipment, yet the instruction requested and specified in the third assignment of error would require the trial judge to say as a matter of law, based alone upon the bill of lading in question, that the transaction was one of interstate commerce so as to oust the state court of jurisdiction. If such a document is inconclusive in one case it is inconclusive in others. The clear reason of the cases cited is to the effect that the bill of lading may be considered as a circumstance with other incidents of the transaction throwing light on the question of fact whether it be interstate or intrastate commerce." *Service v. Sumpter Valley R. Co.*, 88 Ore. 554, 576, 171 Pac. 202.

Under the authority of the case just cited, and *Atchison, T. & S. F. R. Co. v. Harold*, 241 U. S. 371, we feel constrained to hold that the shipment was interstate in character. Respondent strenuously contends, however, that, conceding the character of the shipment, yet appellant's proof is not sufficient to entitle it to recover, because § 8569, U. S. Compiled Statutes, 1916, which provides for the fixing of such tariffs, says:

"Every common carrier subject to the provisions of this act shall file with the commission created by this act and print and keep open to public inspection schedules showing all the rates," etc.

And that, in addition to the proof of filing, there must also be proof of the printing and keeping open to public inspection of the schedules.

There are decisions of some of the state courts which sustain this view. Among others, respondent cites *Oregon R. & Nav. Co. v. Thisler*, 90 Kan. 5, 133 Pac. 539. Our attention is, however, called to a still

later Kansas case, *Atchison, T. & S. F. R. Co. v. Wagner,* 102 Kan. 817, 172 Pac. 519, in which the court says:

"Two reasons are suggested by the appellee in support of the judgment. The first one to be noticed is the claim that the appellant was not entitled to recover, because there was no showing that it had caused the rate filed with the commission to be published. On the other hand, the appellant relies upon the presumption that it took all the necessary steps required by law in establishing the rate. By the Elkins Act of February 19, 1903 (C. 708; 32 Stat. 847 [U. S. Comp. St. 1916, §§ 8597-8599]), a willful failure of the carrier to publish the tariff of rates and charges as filed is made a misdemeanor, and the act declares that upon conviction 'the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense.' In *Cincinnati & Tex. Pac. R. v. Rankin,* 241 U. S. 319, 36 Sup. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265, it was said:

" 'It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law.' 241 U. S. 327, 36 Sup. Ct. 558 (60 L. Ed. 1022, L. R. A. 1917A, 265). . . .

"We think the presumption is one upon which the appellant was entitled to rely until it was met by some evidence to the contrary. Besides, the contention is technical; there is no claim that the facts, if shown, would disclose that the schedule of rates had not been duly published. In *Railroad Co. v. Thisler,* 90 Kan. 5, 133 Pac. 539, some countenance was given to the technical rule which the appellee is now invoking; but there the cause was sent back for a trial of the sole question whether the rate had been duly published. The effect of the presumption that the railway company had not violated the penal statutes was not referred to in the opinion."

The statute being a Federal one, we are, of course, bound by the construction placed upon it by the supreme court of the United States, and respondent,

recognizing that fact, seems to place his main reliance upon *United States v. Miller*, 223 U. S. 599. This was a criminal prosecution for alleged violation of the act, and the question under consideration was the sufficiency of the indictments, the circuit court having sustained demurrers to the indictments because they failed to allege that the schedules and tariffs charged to have been violated had been posted in the manner required by law. The sole question decided was that such posting was not a necessary step in establishing rates and, therefore, no allegation of failure to post was necessary in the indictment. The court did say:

"Publication and posting in the sense of the act are essentially distinct. This is the import of the provision that the requirements relating to 'publishing, posting, and filing' may be modified by the commission in special circumstances, for if publishing included posting, mention of the latter was unnecessary. And from all the provisions on the subject it is evident that the publication intended consists in promulgating and distributing the tariff in printed form preparatory to putting it into effect, while the posting is a continuing act enjoined upon the carrier while the tariff remains operative, as a means of affording special facilities to the public for ascertaining the rates in force thereunder."

It will be observed that the court did not say that the publishing of the tariff was a step necessary to be taken and proved before the tariff could be legally enforced.

In view of the penalties provided by the act for failure to observe any of its terms, is anything necessary to be done and proved beyond the filing of the schedules with the interstate commerce commission to make the schedules enforceable? If so, then the carrier, by neglecting to do such necessary thing, could defeat the purpose of the law and, disregarding the

schedules filed, might charge discriminating rates and plead as a defense to an action brought to enforce the penalty that the schedules were not lawfully in force. Or, if the carrier might not plead its own wrong, there would be no reason why the shipper, who received the benefit of the discrimination and who is equally liable to the penalty, might not so plead. We think the supreme court of the United States has sufficiently indicated that it holds this view. It has said:

"It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law." *Cincinnati, N. O. & T. P. R. Co. v. Rankin,* 241 U. S. 319, L. R. A. 1917A 265.

"The fact is that the railroad had complied with the law as to filing tariff sheets and had also long before the time in question filed a book of rules of the Chicago Car Service Association, of which it was a member. . . . The argument is that such documents were not sufficiently formal to comply with the law, and hence afforded no ground for allowing demurrage. But the contention is without merit. . . . Equally without merit is the insistence that there was no proof that the documents were posted for public inspection." *Berwind-White Coal Min. Co. v. Chicago & E. R. Co.,* 235 U. S. 371.

"Counsel for the railroad offered in evidence copies of its tariff schedules on file with the interstate commerce commission, certified by the chairman of that body, . . . and certification by the chairman is insufficient. . . . In order to determine the liability assumed for baggage it was proper to consider applicable tariff schedules on file with the interstate commerce commission; and the carrier had a Federal right not only to a fair opportunity to put these in evidence, but also that, when before the court, they should be given due consideration. . . . After their admission in evidence by the trial court the schedules could not be disregarded arbitrarily without denying

the railroad's Federal right." *New York Cent. & H. R. R. Co. v. Beaham,* 242 U. S. 148.

"The rate when made out and filed, is notice, and its effect is not lost, although it is not actually posted in the station." *Boston & Maine R. R. v. Hooker,* 233 U. S. 97, Ann. Cas. 1915D 593, L. R. A. 1915B 450.

Still more convincing is the decision of the United States supreme court in *American Express Co. v. United States Horse Shoe Co.,* 244 U. S. 58, when read in connection with the rulings of the state court reported in *United States Horse Shoe Co. v. American Express Co.,* 250 Pa. 527, 95 Atl. 706, which were there being reviewed.

The interstate commerce law was enacted primarily for the protection of the shipper and to prevent discrimination, and unless carriers are required to collect undercharges, even when inadvertently made, a way is left open to defeat the very purpose of the act and to permit the discrimination which the law forbids.

The judgment appealed from will be reversed, with directions to enter a judgment in favor of the appellant against respondent for $215 and costs.

MAIN, C. J., MITCHELL, HOLCOMB, MACKINTOSH, FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 14288. *En Banc.* November 13, 1918.]

MARY E. WICK, *Appellant,* v. WESTERN UNION LIFE INSURANCE COMPANY, *Respondent.*[1]

CONTRACTS (57)—CONSTRUCTION—INTENT OF PARTIES. The most important rule for the construction of contracts is that the intent of the parties must govern, to be gathered from the contract as a whole and not from detached parts; and a clumsy arrangement of words, coupled with the "comma fault," will not contravene a reasonable interpretation according to the intention.

INSURANCE (103) — NONPAYMENT OF PREMIUM — EXCUSES — CONSTRUCTION OF POLICY—NOTICE OF DISABILITY. Notice of total disability must be given prior to default and cancellation for nonpayment of premiums, under a policy of life insurance, providing that if the insured, before attaining the age of sixty, shall furnish proof that he "has," before default, become wholly disabled, the company shall pay for him all premiums "which shall become due" during the continuance of the disability; especially in view of other provisions of the policy requiring insured, upon request, to give proof of continuance of the disability, and limiting the period of grace for payments to one month pursuant to Rem. Code, § 6059-184, during which time the policy "shall remain in full force and effect."

Appeal from a judgment of the superior court for Columbia county, Miller, J., entered January 19, 1917, upon findings in favor of the defendant, dismissing an action on a life insurance policy, tried to the court. Affirmed.

R. M. Sturdevant, Kuykendall & McCabe, and *M. F. Gose,* for appellant.

Graves, Kizer & Graves, for respondent.

MITCHELL, J.—This case was tried in the lower court upon the pleadings and stipulated facts. There was judgment for defendant dismissing the action, and plaintiff appeals.

The material facts admitted are substantially as

[1]Reported in 175 Pac. 953.

follows: Respondent is a domestic life insurance company with its home office at Spokane. It has been engaged in business for a number of years, has a large and well established business, being well known in Spokane and throughout the state. One George William Eyre was an unmarried man and taught school at various points, making visits during vacations to his mother's home in Dayton, which he claimed as his place of residence. On May 1, 1914, in consideration of $23.70, paid by him, respondent made and delivered to him a policy of life insurance. The policy, among other things, contains a total disability clause as follows:

"Total Disability. If the insured, before attaining the age of sixty years, shall furnish due proof that he has, before default in the payment of any premium, become wholly disabled by bodily injury or disease and will be permanently, continuously and wholly prevented thereby from pursuing any and all gainful occupations, the company will pay for said insured all premiums which shall become due and payable during the continuance of such disability.

"The premiums so paid shall not become a charge against the insured, and the values in the table of page two hereof shall increase in the same manner as if the premiums were being paid by the insured. The insured shall, upon due date of any premium, if so required by the said company, furnish due proof of the continuance of such disability. If the insured shall fail to furnish such proof, the company's obligation to pay the premiums hereunder shall cease and the insured shall then resume payment of premiums."

Appellant is the mother of George William Eyre and is named as the beneficiary in the policy. The insured was employed, during the school year of 1914-15, to teach in the public school at Waitsburg, near Dayton. In the latter part of 1914, he became indisposed from a tumor on the brain and was given

a vacation from some time in December, 1914, to the latter part of January, 1915, when he returned to work. His health grew worse. He suffered from headaches, attacks of dizziness, and occasionally fainted; until about March 31, 1915, because of bad health, he could not properly discharge his duties as teacher. His health was such as to impair the general efficiency of the school, whereupon he was relieved by the school board. He died on December 31, 1915, as a result of the tumor. After March 31, 1915, he was unable to teach school or follow any vocation, and was, by his disease, permanently, continuously and wholly prevented from pursuing any gainful occupation within the meaning of the total disability clause of the policy of insurance. While his physical condition so affected his mind that he was incapable of sustained mental effort, he was at no time insane or imbecile, and during the greater part of the time was capable of receiving and understanding communications made to him. He lived with his mother at her home after March 31, 1915. Respondent was not informed of the unfortunate condition of the insured or any reason for nonpayment of premium on the policy until about October 22, 1915, when notice of the disability and a request for advice as to the nature and amount of proof necessary was given by an attorney for the insured. About thirty days before the annual premium became due on May 1, 1915, respondent gave the insured notice thereof by mail, addressing him at his post office address at Dayton. Again, about May 13, 1915, respondent mailed to the insured a letter calling attention to the nonpayment of the annual premium and cautioning him not to overlook it and that the thirty days of grace allowed by the policy would soon be up, and further stating that the

company was ready to extend assistance by permitting semi-annual or quarterly premium payments if preferred. Again, on June 3, 1915, respondent wrote as follows:

"Western Union Life Insurance Company,
"Spokane, Washington.
"Mr. Geo. W. Eyre, No. 13686 June 3, 1915.
"Dayton, Washington, 5th & J.

"Dear Sir: We notice that the grace allowed by the company in the payment of the premium on your policy No. 13686 expired 6-1-15 and we wish to know if this is intentional or otherwise on your part.

"If you are doing so because you are temporarily short of the necessary funds, we wish you to let us know what arrangement you would like to make to defer the payment of part of the premium.

"If you wish, the same can be changed to either semi-annual or quarterly payments, and in fact almost any reasonable arrangement can be made if you will only let us know your wishes in the matter.

"In any case drop us a line stating your intention and oblige, Yours very truly,
"J. N. Wright,
"Secretary."

This last letter manifestly proceeded out of consideration of the company for the insured, because the provision in the policy for reinstatement after it had lapsed for nonpayment of premium depends upon a written application therefor by the insured. None of the three letters was returned, nor was any answer ever made to either by Eyre or any one in his behalf. Afterwards, and prior to the receipt of the notice of disability through the attorney for the insured in October, 1915, respondent canceled the policy upon its records. The premium falling due on May 1, 1915, was never paid, nor was there any application for reinstatement.

The case involves a construction of the contract of insurance. The respondent contends the disability clause of the contract must be held to mean that, if the insured, under an *existing* policy, demand that the insurer pay subsequently accruing premiums, accompanying such demand with due proof of total disability, it must pay such premiums so long as the disability continues, and thus preserve the policy in force, but that such obligation is not placed upon the company where the demand is made and proof of total disability furnished after the expiration of the grace period of thirty days from the premium due date, default in payment by the insured and cancellation of the policy by the company.

On the other hand, appellant contends the contract means, and says, that if, at any time before reaching the age of sixty years, the insured furnish due proof that he became totally disabled before default in the payment of any premium, then the company must pay for said insured all premiums, etc.

Appellant's counsel argue that the determination of the dispute requires an examination of the policy, from which it will appear that, in the last analysis, the total disability clause contains all of the policy which furnishes any aid.

Certain rules are recognized for the construction of written contracts for the purpose of ascertaining from the language the extent to which the parties intended to be bound; and it is the duty of courts to observe them and not attempt to vary, change, or withhold their application. The first and most important of such rules is that the intent of the parties, as expressed in the words they have used, must govern. With such understanding, counsel for appellant, protesting inability to see how there can be two opinions

as to what the total disability clause means, present their view by quoting from the clause as follows:

"If the insured, before attaining the age of sixty years, shall furnish due proof that he has, before default in the payment of any premium, become wholly disabled, . . . the company will pay for the said insured all premiums, etc."

And it is seriously contended, considering the words and punctuation, that the insured has, under this contract, until just before he is sixty years of age to furnish proof that, at some prior time (say a quarter of a century ago), while he was not yet in default of premium payment, he became totally disabled, without losing his rights under the contract.

A clumsy arrangement of words, even coupled with the "comma fault," will not be allowed to contravene a reasonable interpretation according to the intention of the parties at the time of using them.

In the language last above quoted, it is to be noticed that the word "has" is used only once. Now, if in its stead the word "had" or "did" was employed, and no portion of the policy on this particular point considered other than this thus altered, there would be force in the argument made; but the word "has" is quite significant. It is a word which is always used in the present tense. So that the words "shall furnish proof that he *has*" mean at the present time, and, taken in connection with the other language in the part of the total disability clause quoted, mean that he shall "*furnish*" the proof before "default in the payment of any premium."

In addition, the rule for the construction of contracts first mentioned is qualified or extended in such way that the intention of the parties is to be gathered, not from detached parts of the instrument, but from the whole of it. Other portions of the policy in this

instance may be noticed with advantage. Further on, in the total disability clause, in speaking of the payments the company will make for the insured, they are described as those "which *shall* become due and payable during the continuance of such disability." Not those which "did" or "had" become due, but those which "shall" become due. Thus showing the plan by which, if the insured become totally disabled and prevented thereby from pursuing any gainful occupation, and furnish proof thereof before default in the payment of any premium, then the company, for the insured, will make all payments of premiums which *shall* become due and payable during the continuance of such disability. Such a plan is manifestly designed to save the insured, in misfortune, from a forfeiture of his rights under a policy of "term insurance," which otherwise gives the insured only the right, upon the payment of a premium, to insurance upon his life for the term paid for, and the right to continue that insurance from term to term at the same rate.

Other language in this same clause may be considered. It provides:

"The insured shall, however, upon due date of any premium, if so requested by the company, furnish due proof of the continuance of such disability. If the insured shall fail to furnish such proof, the company's obligation to pay the premium hereunder shall cease and the insured shall then resume payment of premiums."

This provision contemplates a possible restoration of the insured from total disability (a change by no means improbable), whereupon the company in its turn is to be relieved from the obligation of paying premiums for the insured. But if appellant's idea of what this contract means shall prevail, when and by

what means shall the company ever know of any relief to the insured from total disability? Obviously, the insured would gain nothing by giving such information, but, on the contrary, would profit by withholding it until just before he became sixty years of age, or if he die before reaching that age, for his beneficiary then to furnish proof to the company that years ago, and prior to the expiration of a period of term insurance, the insured became totally disabled, and in either of such cases hold the company liable and thus deprive it of any possible opportunity under this part of the contract.

There are a number of other provisions in the policy that point this same way, only two of which need be considered. *First:* Under the clause "Consideration," it is stated to be "the advance payment in cash . . . of an annual premium of $23.70 for term insurance for one year ending on the first day of May, 1915, and the payment of an equal amount upon each anniversary date until the date of the death of the insured." *Second:* In the clause entitled "Grace in Payment of Premiums," it says: "In the payment of all premiums hereunder after the first policy year there will be allowed a grace of one month (not less than thirty days) . . . during which time this policy shall remain in full force and effect."

It is to be observed that the provision with reference to grace in payment of premiums is required by subd. 1, § 6059-184, Rem. Code, in all such life insurance policies after January 1, 1912. Clearly these two features, "Consideration" and "Grace in the Payment of Premiums," make the contract one of term insurance; that is, insurance in force during the term or period for which a consideration or premium has been paid and the grace period of thirty days. It is so declared by the words "*during which time this*

policy shall remain in full force and effect," which words, of themselves, are at once useless unless they constitute a limitation as to time upon the vitality of the contract.

With what success shall it be contended that such language, which by the statute is required to be placed in all annual premium payment life insurance policies, is not out of harmony with the heavy obligations sought to be imposed upon the company by appellant's interpretation of the total disability clause of the policy?

Reading this contract as a whole, there is no doubt that the contention of respondent is correct.

The judgment of the trial court so construing it is affirmed.

PARKER, TOLMAN, MOUNT, CHADWICK, FULLERTON, MACKINTOSH, and HOLCOMB, JJ., concur.

[No. 14645. Department One. November 13, 1918.]

OROVILLE INTERNATIONAL SALTS COMPANY, *Appellant*, v. S. RAYBURN *et al.*, *Respondents*.[1]

JURY (8) — RIGHT TO JURY TRIAL — RECOVERY OF MINING CLAIM. In an action involving conflicting claims to unpatented mining claims, defendants are entitled to a jury trial where they alleged ownership and right of possession and that they were wrongfully deprived of possession by plaintiff, which had committed waste.

MINES AND MINERALS (12) — ACTIONS TO RECOVER POSSESSION — TITLE. In possessory actions to recover unpatented mining claims, the better title prevails, the rule in ejectment for recovery on the strength of one's own title not applying.

Appeal from a judgment of the superior court for Okanogan county, Truax, J., entered September 1,

[1]Reported in 176 Pac. 14.

1917, upon the verdict of a jury rendered in favor of the defendants, in an action to determine conflicting claims to a mining claim. Affirmed.

J. H. Templeton and *P. D. Smith,* for appellant.

Mulligan & Bardsley and *E. A. Williams,* for respondents.

MITCHELL, J. — This action involves conflicting claims to an unpatented mining claim for the purpose of mining. In May, 1917, plaintiff commenced the suit. It alleged in the complaint that, since December, 1911, it had been, subject to the paramount title of the United States, the owner of, and in the actual possession of, one certain placer mining claim known as the "Saline Placer Claim"—giving a description of it by governmental subdivisions; that defendants, within the last three years, in pursuance of a conspiracy to defraud plaintiff, received $3,159 in the way of royalties from a third person on account of epsom salts removed from the property by such third person, who was wrongfully put on the property by defendants. The complaint sets out facts upon which such charge of conspiracy was based with considerable detail and particularity, not necessary to be further noticed here. The complaint demanded judgment in said sum of $3,159.

Defendants answered by denials coupled with certain admissions and an affirmative defense, followed by two cross-complaints, only the first of which need be noticed. In their first cross-complaint they alleged in substance that, for many years prior to the commencement of the action, they had been the owners, subject to the paramount title of the United States, of the Saline Placer Claim (describing it), and had been in possession of it, but that plaintiff, within one

year prior to the commencement of the action, wrongfully, unlawfully and without right or authority entered upon and had taken and removed therefrom and converted to its own use a large amount of epsom salts of the reasonable value of $15,000. Plaintiff replied to the first cross-complaint by a general denial only. The case was set for trial at a jury term, and when it was reached plaintiff first moved to dismiss all that part of its complaint asking for damages, and also objected to a jury trial. Defendants insisted on a jury trial. After some colloquy, the court held defendants were entitled to a jury trial. Upon further discussing the matter, plaintiff then elected to go to trial on the issues made by the first cross-complaint and reply. There was a jury trial. At the conclusion of defendants' proof, plaintiff moved, first, for a nonsuit against defendants W. C. Hancock and G. M. Rayburn, and second, for a nonsuit against all of defendants, each on the ground that they had failed to prove title in themselves. Both motions were denied.

A verdict for defendants that they were the owners of, and entitled to the possession of, the placer claim (describing it), but awarding no damages, was returned by the jury.

Plaintiff, in due time, filed a motion for a new trial on the grounds of insufficiency of the evidence to justify the verdict and that the verdict was against the law and the evidence; and also filed a motion for judgment notwithstanding the verdict for the same reasons. Both motions were denied and judgment entered for defendants on and according to the verdict. Plaintiff appeals.

Errors, as assigned, are: (1) The court erred in refusing to discharge the jury; (2) the court erred in refusing to grant appellant's motion for nonsuit

against respondents Hancock and G. M. Rayburn; (3) the court erred in refusing to grant appellant's motion for nonsuit against all of the respondents; (4) the court erred in denying appellant's motion for judgment notwithstanding the verdict; (5) the court erred in denying appellant's motion for a new trial.

As to the first assignment of error, it is apparent respondents were entitled to a jury trial. They alleged ownership and right of possession and that they had been wrongfully deprived of the latter by appellant, which had committed waste.

As to the second, third, fourth and fifth assignments of error, they may properly be considered together—a plan suggested and adopted by appellant in its brief.

There had been a former location of both lode and placer claims on this same property by parties who sold to respondent S. Rayburn a one-fourth interest and the remainder to a corporation, other than appellant, that years ago became defunct and abandoned all claim to the property. Respondent S. Rayburn never abandoned or disposed of his rights, so far as appellant is concerned, and later on with the other respondents filed a placer claim on the property and afterward performed all the annual assessment work.

Appellant proceeds in presenting the cause upon the theory that, in such case as this, respondents must recover, if at all, on the strength of their own title and not on the weakness of their adversary's title, or, as counsel state it, respondents are burdened to show title against appellant and every other person except the United States. With such view, it then proceeds to argue that the placer location notices of respondents were fatally defective and contends, therefore, that the judgment is erroneous. Appellant misconceives the character of the burden in this case. The

rule is declared in the case of *National Milling & Mining Co. v. Piccolo,* 54 Wash. 617, 104 Pac. 128, to be:

"And in determining this question it must be remembered that in possessory actions to recover unpatented mining claims the rule of ejectment, namely, that the plaintiff must recover on the strength of his own title and not the weakness of his adversary's, does not apply. In actions of this sort the better title prevails."

There is ample testimony in this case to satisfy a jury of compliance on the part of respondents with the requirements of the statute as to their filing on the property as a placer claim and doing all subsequent assessment work, and there is no testimony to show that respondents have ever parted with any interest to the appellant. In the trial it does not appear that appellant requested a single instruction to the jury, and, on the other hand, the law of the case was quite fully covered by instructions given, none of which were excepted to by the appellant.

Judgment affirmed.

MAIN, C. J., TOLMAN, FULLERTON, and PARKER, JJ., concur.

[No. 14794. Department One. November 14, 1918.]

ANDERSONIAN INVESTMENT COMPANY, *Appellant*, v. JOHN PARRY JONES *et al.*, *Respondents*, W. E. HANSON, *State Bank Examiner et al., Respondents and Appellants.*[1]

MORTGAGES (8)—DEBTS SECURED — FUTURE ADVANCES — INTENT—FAILURE TO ADVANCE. Where a mortgage was given for $25,000 to secure advances for the construction of a building, but the mortgagee advanced thereon but $13,125, and it appears that $10,000 was loaned to the constructor of the building on its personal credit and promissory note, under an agreement that such sum and $2,000 additional be expended on the building before any part of the $25,000 should be advanced, and the mortgagors were not parties to such agreement, it was not the intention to make the $10,000 an advance secured by the mortgage, and the mortgagee has a lien only for the sums actually advanced.

MECHANICS' LIENS (71)—PRIORITY—MORTGAGES—FOR FUTURE ADVANCES. Under Rem. Code, § 1132, giving a preference to mechanics' liens over any mortgage which may attach subsequently to the time of the commencement of the labor, an architect's lien upon a building is superior to a mortgage for future advances, where the mortgagee had previous notice that the architect had already commenced to perform labor upon the plans and specifications and would continue as architect and superintendent of construction.

SAME (71). Where a second mortgage was subject to a mortgage for $25,000 to secure future advances for the construction of a building, which sum was ample to pay all liens, but only $13,125 was advanced, resulting in liens for labor and materials, equity and good conscience requires that the liens be substituted as superior liens in place of the first mortgage to the extent of $25,000, although some of the labor was furnished after the giving of the second mortgage; since the second mortgagee had the benefit of the construction secured by the first mortgage.

COSTS (61, 72) — ON APPEAL — SUCCESSFUL PARTIES — APPORTIONMENT ON CROSS-APPEALS. Upon cross-appeals in a foreclosure suit, plaintiff, unsuccessful in all respects, is entitled to no costs; a second mortgagee, resisting plaintiff's claim, is entitled to costs therefor, but to no costs for an unsuccessful cross-appeal against

[1]Reported in 176 Pac. 17.

other defendants; a successful lien claimant awarded superiority over all other parties is entitled to costs as part of his costs and disbursements in the foreclosure of his lien; and other lien claimants, successfully resisting plaintiff's claims, are entitled to costs as part of their foreclosure costs and disbursements; while the defendant mortgagors, having joined with the second mortgagee and incurred no costs apart from costs awarded to it, will be denied costs.

Cross-appeals from a judgment of the superior court for King county, Bell, J., entered October 27, 1917, upon findings in favor of certain defendants, in an action to foreclose a mortgage, tried to the court. Reversed on Braida's appeal; affirmed in other respects.

Edwin H. Flick and *Fred D. Fletcher,* for appellant Andersonian Investment Company.

Douglas & Douglas, H. D. Folsom, Jr., and *A. H. Wiseman,* for appellant Braida.

C. H. Winders, M. M. Richardson, and *Hugh C. Todd,* for appellant Hanson.

Van Dyke & Thomas, for respondents John Parry Jones *et al.*

Walter S. Fulton, Jay C. Allen, and *Roberts, Wilson & Skeel,* for respondents Crane Company *et al.*

PARKER, J.—This action was commenced by the plaintiff, Andersonian Investment Company, in the superior court for King county, seeking foreclosure of a mortgage executed by the defendants John Parry Jones and wife upon a lot and apartment house thereon in Seattle, owned by them, purporting to secure an indebtedness of $25,000 owing by them to the plaintiff.

The foreclosure was sought upon the ground that there was default in the payment of interest on the part of Jones and wife at the time of the commence-

ment of this action, entitling the investment company to declare the whole indebtedness due. The foreclosure was resisted by Jones and wife, claiming that there was no default on their part in the payment of interest; that but $13,125 of the loan had been advanced by the investment company, on which the interest had been paid in full at the time of the commencement of this action; and that the failure of the investment company to advance the balance of the $25,000 loan was in violation of its contract to advance the same from time to time to be applied in payment of bills incurred in the construction of the apartment house, which violation of its contract resulted in enforcible mechanics' and materialmen's liens to the extent of several thousand dollars being filed against the property. These several lien claimants assert their rights by cross-complaints, seeking foreclosure of their several liens. The German-American Mercantile Bank, by its cross-complaint, seeks the foreclosure of a second mortgage upon the same property, executed by Jones and wife to the Central Realty Company to secure an indebtedness of $5,000 owing by them to that company, which was assigned to the bank. Foreclosure of that mortgage is sought upon the ground that there had been default on the part of Jones and wife in the payment of interest thereon which entitled the bank to declare the whole indebtedness due. The bank also resists foreclosure of the $25,000 mortgage by the investment company upon the same ground as Jones and wife resists that foreclosure, although it is conceded that the investment company's mortgage is superior to the bank's mortgage to the extent of the loan secured thereby which has been actually advanced by the investment company. While this case was pending in the superior court, the German-American Mercan-

tile Bank passed into the hands of the state bank examiner because of its insolvency, who now succeeds to all its rights here involved.

Trial in the superior court upon the merits resulted in findings and decree: (1) Denying to the investment company foreclosure of its mortgage upon the same ground, in substance, as such foreclosure was resisted by Jones and wife and the bank, but preserving the investment company's mortgage as a first lien superior to all others here involved to the extent of $13,125 advanced by the investment company upon the $25,000 loan, and the sum of $1,743.28 additional advanced by the investment company to the receiver appointed in this action, for the purpose of finishing the building and putting it in rentable condition in the interest of all parties; (2) awarding foreclosure of the lien claims, all subject to the investment company's mortgage to the extent of the amount actually advanced by it upon the indebtedness to be secured thereby, as above noticed; but decreeing the liens to be superior to the bank's mortgage; (3) awarding foreclosure of the bank's mortgage as a lien inferior to all others here asserted, such foreclosure being awarded upon the ground of default in payment of interest entitling the bank to declare the whole indebtedness due.

The plaintiff investment company has appealed from the decree in so far as it is denied foreclosure of its mortgage for the full amount of $25,000 and interest as a first lien upon the property. John Braida, assignee of William J. Jones, cross-complainant, asserting a lien claim for services rendered by Jones as architect in the construction of the building, has appealed from the decree in so far as it adjudges the lien claim for such services to be inferior to that of the lien of the investment company's mortgage. The

state bank examiner, successor in interest of the German-American Mercantile Bank, has appealed from the decree in so far as it adjudges the bank's mortgage lien inferior to the liens of the laborers and materialmen, conceding that the architect's lien is superior to the bank's mortgage.

In August, 1915, and for some time prior thereto, John Parry Jones and wife were the owners of the lot in question, it being then unimproved. The Central Realty Company was then, and until near the time of the commencement of this action, engaged in promoting the construction of buildings upon unimproved property in Seattle by securing loans and entering into contracts for the construction of such buildings, looking to the receiving of commissions upon such loans and profits upon such contracts. On August 5, 1915, the realty company entered into a contract with Jones and wife looking to the construction of an apartment house upon their lot, for which it was to receive $30,000 in the form of mortgages or the proceeds thereof. It appears that preliminary plans had then been prepared for the building by W. J. Jones, an architect, at the instance of the realty company, which plans, though not then completed in detail, were, as viewed by the parties, sufficiently definite as to the nature and size of the building to be constructed to enable them to contract with reference thereto. In that contract the realty company was designated as the party of the first part, and Jones and wife were designated as parties of the second part. So far as we need here notice its provisions, it reads as follows:

"It is agreed by and between the parties hereto that, for and in consideration of the sum of $30,000 to it paid in the manner hereafter set forth, by the parties of the second part, the party of the first part agrees

to erect upon the above described property a three-story apartment house in accordance with the plans and specifications of W. J. Jones, architect, and under his supervision, the plans and preliminary specifications having been agreed upon by the parties hereto. The party of the first part hereby agrees that said sum of $30,000 shall include all expenses in connection with the erection of said apartment house including the actual cost of the building itself, all commissions for obtaining the money and all architect fees and expenses and that said building will be erected in accordance with said plans and specifications for said sum.

"Said sum of $30,000 is to be secured in the following manner: The parties of the second part are to give mortgages upon said property running to whomever the party of the first part may secure who will furnish said money. The first mortgage to bear interest at the rate of 7% per annum, to be for not less than three years, and to be for whatever amount the party of the first part can secure upon the property. The second mortgage to be for the balance of said $30,000, to bear interest at the rate of 8% per annum and to be repaid out of the rents and profits derived from the operation of said apartment house, it being understood, however, that operating expenses, including the sum of $60 per month paid to the parties of the second part for janitor services and all taxes and interest, shall be first deducted from the rentals and the balance applied upon the second mortgage.

"As soon as said plans and specifications have been prepared by the architect and approved by the city building department the party of the first part agrees to proceed diligently with the erection of said building and to complete the same in as short a time as possible, building conditions and the state of the weather permitting. The party of the first part to have the collection of all rents and the handling and operation of said building until the net income derived from such rental after deducting the regular real estate commission for collecting rents shall have liquidated the second mortgage."

There is no stipulation in this contract as to what the cost of the building should be to the realty company nor as to what its actual value should be when completed, aside from the stipulation that it should be "according to plans and preliminary specifications" agreed upon. In other words, Jones and wife were to have the completed building in consideration of the execution of the mortgages and the placing of the control and management of the building in the hands of the realty company. In pursuance of this contract, the realty company induced the investment company to agree to make a loan of $25,000 to Jones and wife to be secured by a first mortgage upon the property, the money to be advanced from time to time by the investment company to the realty company to be used in the construction of the building, as presently to be noticed.

On August 18, 1915, Jones and wife executed and delivered to the investment company a note for $25,000, payable five years from date, with provisions for its maturing upon default in payment of interest; and also executed and delivered to the investment company a first mortgage upon the property, securing the same. At the same time a contract was entered into between the investment company and the realty company and Jones and wife which, in so far as we need here notice its terms, reads as follows:

"This agreement, made this 18th day of August, 1915, between Andersonian Investment Company, as party of the first part, Central Realty Company, party of the second part, and John Parry Jones and Kate Jones, his wife, parties of the third part;

"Witnesseth: That for and in consideration of matters hereinafter recited, said parties agree with each other as follows:

"First: That the Andersonian Investment Company will and does by these presents agree to loan to parties

of the third part, their heirs or assigns, the sum of twenty-five thousand dollars ($25,000) under the terms expressed in a certain mortgage this day executed by parties of the third part, which loan is to be guaranteed, and is by these presents guaranteed by party of the second part herein, its successors and assigns, said loan to be secured by the property described in said mortgage, and now herein recited:

. . .

"It is further stipulated and agreed as a specific consideration of said loan that said Central Realty Company shall guarantee the ultimate payment of same, and that in consideration thereof, and of other matters herein recited, said Central Realty Company shall have full charge of the building to be erected upon said premises, and shall have the right during the life of said mortgage to collect all the income from said premises and pay all bills and to apply the net proceeds to the payment of the liens existent upon said property as in its judgment may seem expedient.

"It is further stipulated and agreed, however, that party of the third part, namely John Parry Jones, shall be retained as janitor of said premises as long as his services shall be satisfactory to parties of the first and second part herein at the rate of sixty dollars ($60) per month, but that third parties other than in the matter just recited shall have no further or other rights during the life of this mortgage in the premises, but that all control and direction of the policies to be pursued in the handling of said apartment house shall be left with the Central Realty Company while its present officers are in control; it being understood and agreed, however, that in the event of a transfer of control to other parties, that party of the first part herein shall first approve the right of the successors to so continue in charge of said premises during the life of the mortgage.

"It is further stipulated and agreed that said Central Realty Company in conjunction with said parties of the third part herein shall and they hereby stipulate and agree to provide for all remaining payments necessary to the proper and final completion of the

apartment house to be erected on said premises, which apartment house shall be of the reasonable value of thirty-seven thousand dollars ($37,000) when erected, and shall be in strict accordance with the plans and specifications, true copy of which are hereto attached and made part of this agreement. . . .

"It is further stipulated and agreed that the entire loan herein referred to shall be checked out through and over the signature of Central Realty Company, to be signed by the president of said corporation and countersigned by one additional officer, and that all of said funds shall be applied in and to the erection of said building, with the exception of such commissions and expenses as may be required to be paid. . . .

"The janitor to have an apartment for himself and family in the basement of the building, free of charge."

This contract, it will be noticed, continues the relationship between the realty company and Jones and wife substantially as existing under their agreement of August 5th. It contains no language obligating Jones and wife to compensate the realty company for the construction of the building, other than by the execution of the mortgages for $30,000 as originally agreed by them, though it may seem to provide for a building of greater value than was contemplated by the contract of August 5th between the realty company and Jones and wife.

On the day of the execution of the $25,000 note and mortgage and the making of the contract between the investment company, the realty company, and Jones and wife, another contract was entered into between the investment company and the realty company, Jones and wife not being parties thereto, whereby the realty company agreed with the investment company to furnish the additional sum of $12,000 towards the construction of the building. This is found in a pro-

vision of the contract relating to the manner of advancing and applying the $25,000 of the loan from time to time towards the construction of the building, and reads as follows:

"It being understood and agreed that the Central Realty Company and John Parry Jones and wife, the owners of the property herein described, have already agreed to furnish an additional fund of $12,000 necessary to the erection of said building."

While this was a binding agreement on the part of the realty company, it plainly was not so upon Jones and wife, since they were not parties to it. It would seem that its purpose was to insure the ultimate making of the $25,000 mortgage a good, marketable first mortgage by having the property of sufficient value for that purpose, the realty company being apparently sufficiently interested in the securing of the loan to induce it to enter into the contract.

A few days later, to wit, on August 23, 1915, another contract was entered into between the realty company and the investment company, Jones and wife not being parties thereto, reading as follows:

"Whereas, there has this day been deposited to the credit of the Central Realty Company Special fund in the German-American Mercantile Bank the sum of $10,000, and whereas on the 18th day of August, 1915, an agreement was entered into between the Andersonian Investment Company and the Central Realty Company and John Parry Jones relative to a loan for $25,000 which was to be made by said Andersonian Investment Company for the purpose of erecting a building upon lot two, block eight of the replat of 12th Avenue addition to the city of Seattle, and whereas said contract and agreement provided for the expenditure of $12,000 in addition to the $25,000 to be furnished by the Andersonian Investment Company, it is agreed by the parties hereto that the said sum of $10,000, together with an additional sum

of $2,000, shall be expended by the Central Realty Company, Inc., and used in the erection of said building and the carrying out of said above mentioned agreement before any part of the $25,000 is to be paid over by the Andersonian Investment Company to the Central Realty Company Special account. And the Central Realty Company shall show receipts for payments duly made in connection with said building, which payments shall only be made upon architect's certificates issued by W. J. Jones, architect, in the sum of $12,000 before said $25,000 or any part thereof is to be called for."

At the same time and as part of the same transaction, the realty company executed and delivered to S. E. Anderson, for the investment company, a promissory note for $10,000, and that sum was then paid over to the realty company by the investment company as agreed upon.

The construction of the building was thereupon proceeded with by the realty company, and after the expenditure by it of the $12,000 thereon, the investment company paid over to the realty company upon the $25,000 loan, sums aggregating $13,125, between January and May, inclusive, 1916. This, we assume, was applied by the realty company in payment of bills incurred in the construction of the building. No other sum was ever paid by the investment company to the realty company in connection with the construction of the building, and no money whatever was paid upon the $25,000 loan or otherwise by the investment company to Jones and wife. Enforcible liens for material and labor furnished upon the building had accumulated and been filed aggregating several thousand dollars, all of which remained unpaid at the time of the commencement of this action in September, 1916. All of these lien claims could and would have been satisfied, we may safely assume, had the investment com-

pany paid over to the realty company the balance of the $25,000 loan, instead of refusing to do so and claiming that the $10,000 paid to the realty company on August 23, 1915, was an advance upon the $25,000 loan to Jones and wife, instead of an independent loan to the realty company.

When this action was commenced the building had not been quite completed. The realty company being unable to complete it, a receiver was appointed in the action, who took charge of the building in the interest of all parties and, under order of the court, completed it at a cost of $1,743.28, which sum was furnished by the investment company, as already noticed. This was done manifestly to the end that the property could be rented and become income producing pending this litigation.

The $5,000 mortgage executed by Jones and wife to the realty company and assigned to the bank, and now in the hands of the state bank examiner as its successor in interest, was executed August 19, 1915, and concededly inferior to the $25,000 mortgage to the extent of the moneys actually advanced upon that loan, to wit, the $13,125 paid over by the investment company to the realty company and the $1,743.28 advanced by the investment company to the realty company to complete the building. It is conceded that the interest upon the $5,000 mortgage is in default, giving the owner thereof the right to declare the whole amount due.

The main contention here made in behalf of appellant investment company is that the trial court erred in refusing to treat the $10,000, paid by it to the realty company on August 23, 1915, as an advance on the $25,000 loan to Jones and wife. It is plain that, if this $10,000 was no part of the $25,000 loan, then interest had been paid upon all that was due at the time

of the commencement of this action, that is, upon the portion of the loan which had then actually been advanced. On the other hand, if the $10,000 was an advance upon the $25,000 loan, then the interest which had been paid on that loan was not payment thereof in full, but there was default therein at the time of the commencement of this action, which would entitle the investment company to declare the whole amount due and maintain its action of foreclosure. This contention, in its last analysis, presents only a question of fact as to what the intentions of the realty company and the investment company were on August 23, 1915, at the time of the execution of the $10,000 note by the realty company to the investment company and the paying over by the investment company to the realty company of that sum to be used by it in the construction of the building. It may be conceded that the relation between Jones and wife and the realty company with reference to the construction of the building was then such that whatever the intention then was on the part of the realty company and the investment company as to whether this $10,000 was an advance upon the $25,000 loan or an independent loan to the realty company, was binding upon Jones and wife.

There was introduced upon the trial of this case a large amount of other evidence with a view of throwing light upon the question of the intentions of the realty company and the investment company touching this $10,000 paid over by the investment company to the realty company. We have painstakingly reviewed all of this evidence. It would be quite impracticable to analyze it in detail here, nor do we think any useful purpose would be served by so doing. We deem it sufficient to say that the several contracts above quoted from, and especially the one of Au-

gust 23, 1915, between the investment company and the realty company contemporaneously with the execution of the $10,000 note, the paying over of the $10,000 by the investment company to the realty company to be used in the construction of the building, together with the numerous sidelights thrown on the several transactions by the evidence, convinces us that the learned trial court was correct in concluding that this $10,000, paid by the investment company to the realty company, was intended to be, and was in law and in fact, but a loan by the investment company to the realty company wholly independent of the $25,000 loan of the investment company to Jones and wife. We agree with the trial court that it was made solely upon the credit of the realty company. The very language of the contract of August 23, 1915, above quoted, seems all but conclusive upon this question, and the surrounding circumstances disclosed by the evidence, it seems to us, show the trial court's conclusion correct with still greater certainty. It follows that, at the time of the commencement of this action, only $13,125 of the loan had been advanced by the investment company to the realty company on behalf of Jones and wife, and that therefore it was entitled to interest only upon the sums so advanced. Since the evidence shows that interest had been fully paid upon the sums so advanced, there was no default on the part of Jones and wife at the time of the commencement of this action. Therefore the investment company is not entitled to foreclose its mortgage by this action; though, of course, as decreed by the trial court, that does not impair the investment company's mortgage as a first lien in securing the amount actually advanced on the $25,000 loan.

It is contended in behalf of the appellant John

Braida, assignee of William J. Jones, the architect of the building, that the trial court erred in refusing to adjudge the lien of the architect for preparing plans and specifications and superintending construction of the building superior to that of the investment company's mortgage. It is argued that the architect's lien is superior to the investment company's mortgage because he commenced to perform labor upon the plans and specifications some two months prior to the execution of that mortgage. The trial court found that such work was commenced on June 4, 1915, which, it will be noticed, was over two months prior to August 18, the date of the investment company's mortgage. That this work was so commenced and prosecuted by the architect at the instance of the realty company, acting for itself and as agent for Jones and wife, is quite plain. It seems equally plain that the preliminary plans and specifications were for this same building, although some changes may have been made therein in the final construction of the building. We note that not only does the evidence support these conclusions, but it also plainly shows that the investment company, at the time it was negotiating for the making of the loan, and at the time it received the mortgage, had full knowledge of the fact that the architect, Jones, had commenced work on the plans and specifications for the building, and that it was then contemplated that he should continue to be the architect and superintend the construction of the building. It is conceded that the architect is entitled to a lien for his work as such. It was squarely so held in *Gould v. McCormick,* 75 Wash. 61, 134 Pac. 676, Ann. Cas. 1915A 710, 47 L. R. A. (N. S.) 765, the only question here being as to whether the architect's lien is superior to that of the investment company's mort-

gage. Section 1132, Rem. Code, of our lien statutes, provides:

"The liens created by this chapter are preferred to any . . . mortgage . . . which may attach subsequently to the time of the commencement of the performance of the labor, or the furnishing of the materials for which the right of lien is given by this chapter . . ."

It seems quite clear to us that the learned trial court fell into error in decreeing the architect's lien, now held by Braida, to be inferior to the investment company's mortgage, and that as to this branch of the case the decree must be reversed.

Contention is made in behalf of appellant state bank examiner, successor in interest to the German-American Mercantile Bank, now owner of the $5,000 second mortgage, that the trial court erred in decreeing the labor and material liens superior to this mortgage, conceding that the architect's lien is superior because of the date of the commencement of his work being prior to the execution of the mortgage. We may assume for argument's sake, that all the labor and material, for which liens were foreclosed by the decree were not commenced to be furnished before the execution and recording of this mortgage. However, had the whole of the $25,000 loan to be secured by the first mortgage been advanced and applied as agreed upon by Jones and wife, the realty company and the investment company, these liens would not have been upon the property at all; but instead that mortgage would have been a lien upon the property superior to the $5,000 second mortgage to an amount at least as large as the amount which was actually advanced upon the loan, with the amount of the liens added. So the bank examiner, as successor in interest of the German-American Mercantile Bank, owner of the $5,000

second mortgage, is in no worse position than he would have been had the $25,000 loan been advanced as contemplated. These liens were all incurred for labor and material which worked to the benefit of the holder of this $5,000 second mortgage, and manifestly all parties, including the bank and the bank examiner, its successor in interest, understood that the $25,000 mortgage was superior to the $5,000 mortgage. The bank examiner was, of course, permitted to insist that only a part of the $25,000 had been advanced, but we do not think there can, in good conscience, be any objection to the placing of the lien claimants, in a sense, in the shoes of the investment company, and the substituting of their liens as superior liens in the place of the first lien of the $25,000 mortgage, so long as the total of such liens and the amount advanced on the $25,000 does not exceed the total amount of that loan as contemplated and secured by the first mortgage. These considerations lead us to the conclusion that, under all the circumstances of the case, equity and good conscience dictate that these liens should be held superior to this $5,000 second mortgage, and that the trial court correctly so determined.

The decree is in all things affirmed, except in so far as it adjudges the lien of the architect, Jones, which has been assigned to appellant Braida, inferior to the investment company's first mortgage, and that, as to that lien, the decree is modified so as to adjudge it superior to that mortgage. The superior court is directed to modify the decree and cause sale of the property and distribution of the proceeds thereof to be had accordingly.

This disposition of the cause upon the merits, and the different interests involved, renders it necessary that we make some directions as to the awarding of

costs in this court. The investment company will, of course, not recover any costs in this court, since it has in all respects been unsuccessful in its appeal.

The state bank examiner is awarded costs incurred by him solely as respondent in resisting the appeal of the investment company, as a part of his costs and disbursements in the foreclosure of his $5,000 second mortgage.

The state bank examiner filed a separate brief as appellant, seeking the reversal of the decree in so far as it adjudged the lien claims superior to his mortgage. Having been unsuccessful in his appeal, he, of course, cannot recover costs incurred by him as appellant.

Appellant John Braida, as assignee of William Jones, the architect, having been successful in his appeal in establishing the superiority of his lien, is awarded costs as appellant, as a part of his costs and disbursements in the foreclosure of his lien.

The lien claimants Crane Company, Schwager-Nettleton Mills and the Seattle Paint Company, have jointly filed a brief as respondents, resisting the appeal of appellant state bank examiner. These claimants are awarded costs in this court as a part of their costs and disbursements incurred in the foreclosure of their lien claims.

Respondents Jones and wife have joined with the state bank examiner in his brief in resisting the appeal of the investment company. Having incurred no costs apart from the costs awarded to the state bank examiner, they are denied recovery of costs in this court.

MAIN, C. J., MITCHELL, TOLMAN, and FULLERTON, JJ., concur.

[No. 23. *En Banc.* November 19, 1918.]

In the Matter of the Proceedings for the Disbarment of HIRAM C. GILL, HEBER B. HOYT, and HERMON S. FRYE.[1]

ATTORNEY AND CLIENT (7)—DISBARMENT—GROUNDS. An agreement to advise and defend, free of charge, the members of a mercantile association, which solicited membership and advertised the contract, is unprofessional as a solicitation of business; but is not ground for the disbarment of attorneys who voluntarily discontinued the arrangement and had borne a professional reputation of the highest order for many years, and were guilty of no fraud or moral turpitude.

Proceeding filed in the supreme court February 16, 1918, for the disbarment of attorneys, upon the findings of the state board of law examiners against the accused. Denied.

The Attorney General and *John A. Homer, Assistant,* for the state, contended, among other things, that the enumeration of grounds for disbarment is not a limitation on the general power of the court in this respect and attorneys may be removed for common law causes whenever the exercise of their privileges and functions becomes inimical to the due administration of justice. Thornton, Attorneys, § 759; *In re Lambuth,* 18 Wash. 478, 51 Pac. 1071; *In re Robinson,* 48 Wash. 153, 92 Pac. 929, 15 L. R. A. (N. S.) 525; *State ex rel. Dill v. Martin,* 45 Wash. 76, 87 Pac. 1054; *State ex rel. Hardin v. Grover,* 47 Wash. 39, 91 Pac. 564; *State ex rel. Murphy v. Snook,* 78 Wash. 671, 139 Pac. 764; *State ex rel. Mackintosh v. Rossman,* 53 Wash. 1, 101 Pac. 357, 21 L. R. A. (N. S.) 821; *Chreste v. Commonwealth,* 178 Ky. 311, 198 S. W. 929; *Matter of Newell,* 174 App. Div. 94, 160 N. Y. Supp. 275; *Lenihan*

[1]Reported in 176 Pac. 11.

v. Commonwealth, 165 Ky. 93, 176 S. W. 948; *In re Hilton,* 48 Utah 172, 158 Pac. 691, Ann. Cas. 1918 A 271; *In re Radford,* 168 Mich. 474, 134 N. W. 472; *Commonwealth v. Roe,* 129 Ky. 650, 112 S. W. 683, 19 L. R. A. (N. S.) 413; *In re Egan,* 22 S. D. 355, 117 N. W. 874; *In re Rouss,* 221 N. Y. 81, 116 N. E. 782.

The conduct of appellants was inimical to the due administration of justice and warrants proper discipline by suspension or disbarment. *Chreste v. Commonwealth,* 171 Ky. 77, 186 S. W. 919, Ann. Cas. 1918 E 122; *In re Clark,* 184 N. Y. 222, 77 N. E. 1; *Ellis v. Frawley,* 165 Wis. 381, 161 N. W. 364; *Ingersoll v. Coal Creek Coal Co.,* 117 Tenn. 263, 98 S. W. 178, 119 Am. St. 1003, 9 L. R. A. (N. S.) 282; *Alpers v. Hunt,* 86 Cal. 78, 24 Pac. 846, 21 Am. St. 17, 9 L. R. A. 483; *Langdon v. Conlin,* 67 Neb. 243, 93 N. W. 389, 108 Am. St. 643, 60 L. R. A. 429; *Holland v. Sheehan,* 108 Minn. 362, 122 N. W. 1, 23 L. R. A. (N. S.) 510; *In re Welch,* 156 App. Div. 470, 141 N. Y. Supp. 381; *Matter of Newell,* 174 App. Div. 94, 160 N. Y. Supp. 275; *Matter of Schwarz,* 175 App. Div. 335, 161 N. Y. Supp. 1079; *Matter of Neuman,* 169 App. Div. 638, 155 N. Y. Supp. 428.

Mr. Gill was responsible and subject to discipline for any improper use made of his name by the firm. *Matter of Rothschild,* 140 App. Div. 583, 125 N. Y. Supp. 629; *In re Hutson,* 127 App. Div. 492, 111 N. Y. Supp. 731.

Ogden & Clarke, Walter Schaffner, Arthur E. Griffin, Edward H. Wright, and *Dallas V. Halverstadt,* for accused.

PARKER, J.—This cause is a consolidation of three separate proceedings which were, by stipulation, consolidated and heard together before the state board

of law examiners; and is now in this court for final disposition upon the report of the evidence produced before that board and the findings made by it. The findings are against each of the accused.

The proceedings were had before the board in pursuance of chapter 115, Laws of 1917, p. 421. Our recent decision in *In re Bruen,* 102 Wash. 472, 172 Pac. 1152, interpreting that law in the light of the constitution and the inherent power of this court relating to the disbarment and disciplining of attorneys as officers of the courts, makes it our duty to dispose of the cause upon the evidence produced before the board and reported to us; and also upon the findings of the board, except in so far as we may conclude that the latter are not supported by the evidence.

The accused are each duly admitted to practice law in the courts of this state, and have been engaged in the practice of law as copartners in Seattle for some eighteen years past. It is alleged that they have been guilty of unprofessional conduct in that they solicited business, or rather caused another to solicit business for them, through the entering into the following contract:

"This agreement made and entered into this 19th day of June, 1917, by and between the Merchants Protective Corporation, organized and existing under the laws of the state of Indiana, and authorized to do business in the state of Washington, the party of the first part; and Gill, Hoyt & Frye, attorneys at law, of Seattle, Washington, the parties of the second part:

"Witnesseth: That both parties hereunto are mutually desirous of entering into an agreement whereby said second parties are to represent the first party as its attorney with clients in office advice and consultations free, free representation as defendants in police and justice of the peace courts only.

"Now, therefore, for and in consideration of the mutual agreements herein contained, it is mutually

agreed by and between the parties hereto that the second parties shall act as attorneys for members holding paid membership certificates in the company of the first part in matters covered as above and by said membership certificate, and shall receive therefor in advance from the party of the first part the sum of one ($1) dollar per client for new clients and the sum of two ($2) dollars in renewed members per year for which they shall furnish consultation and advice, legal and otherwise, at their office and defend members in police court and the justice court in accordance with the membership certificate marked Exhibit A.

"It is further mutually agreed that said parties of the second part shall look after collections for said members on the basis of ten per cent unless otherwise agreed upon, except when suit is brought.

"It is further agreed that said second parties are not to render any services without compensation from members of said corporation, except as herein stated and in the membership certificate attached hereto and marked Exhibit A.

"It is further agreed that, at all times during the existence of this agreement, the second party will forward all legal papers and collections whenever possible to do so to associated offices of the first part.

"The parties hereto further agree that this contract shall continue for a period of time covered by the various subscription membership certificates from which the second parties receive a fee with privilege of renewal.

"In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written. Executed in duplicate.

"(Signed) The Merchants Protective Association,
"By Sam Cohen

"(Signed) Gill, Hoyt & Frye, Attorneys at Law.

"Exhibit A.

"The Merchants Protective Corporation.
(Incorporated 1913)
"Membership Certificate

"This is to certify that ——— is admitted to membership in the above corporation, and is entitled to

legal advice and consultation on all personal business or private matters, without charge at the office of the attorneys retained by and at the expense of the above corporation, for the period of one year from the date hereof.

"Members are defended in all civil or criminal actions brought against them, at any time, in police court or justice of the peace courts, of this city, without charge by our attorneys.

"Members receive legal advice and information on all new state laws or ordinances of this city, without charge.

"The object of this corporation is to protect the above member from loss through fraud, bad credits, bad checks, unfair claims, and to arbitrate all matters when dissension arises.

"Warning.

"All persons committing crimes against the above member will be prosecuted to the full extent of the law.

"In witness whereof, the corporation has caused this certificate to be signed by its duly authorized officer and sealed with the seal of the company, this —— day of ———, 191—.

"(Seal) S. Reiker, President.

"Gill, Hoyt & Frye, Attorneys."

It plainly appears that the Merchants Protective Corporation has no business in Seattle or elsewhere other than the solicitation of members and the collecting of the membership fees, the larger part of which fees are retained by the corporation, the balance being turned over to attorneys with whom it may have entered into contracts of this nature, in a number of different cities and towns throughout the country. Several hundred members were obtained and membership fees collected in Seattle from them by the corporation's representative, the accused receiving their share thereof under the terms of the contract. They continued to receive such fees and render services in

pursuance of the terms of the contract for a considerable time, up until the commencement of this investigation, when they voluntarily ceased to receive the fees or render service under the contract.

It seems to us that the solicitation of law business in this manner constituted unprofessional conduct subjecting the accused to discipline. It may not be an easy matter, under all conditions, to say just what acts constitute unprofessional conduct in the soliciting of business; but we think that the employment of or contracting with another by an attorney looking to the soliciting of business by the other for the attorney has always been regarded as unprofessional. Among the numerous decisions so holding we note the following: *Chreste v. Commonwealth,* 171 Ky. 77, 186 S. W. 919; *Holland v. Cheehan,* 108 Minn. 362, 122 N. W. 1, 23 L. R. A. (N. S.) 510; *Ingersoll v. Coal Creek Coal Co.,* 117 Tenn. 263, 98 S. W. 178, 119 Am. St. 1003, 9 L. R. A. (N. S.) 282; *Matter of Clark,* 184 N. Y. 222, 77 N. E. 1; *Ellis v. Frawley,* 165 Wis. 381, 161 N. W. 364. There was, however, no fraud or moral turpitude on the part of the attorneys involved.

It remains but to determine what the judgment shall be in this particular case. This, of course, is a matter of discretion, to be determined in view of all the facts shown. There is no absolute standard to guide us in this case. Each of the accused, it plainly appears from the evidence, has practiced law for eighteen years or more in our courts without any accusations of unprofessional conduct of any nature being made against either of them. Indeed, until this accusation was made, each seems to have borne a professional reputation of the highest order. The nine superior judges for King county, in whose courts the accused have had a large practice, testify to their good pro-

fessional reputation. Eleven of the leading attorneys of Seattle, among whom is a former judge of this court, also testify to the professional reputation of the accused as good. There is nothing in this record suggesting otherwise, prior to the comparatively recent occurrence of the facts upon which this prosecution is rested. We feel constrained to hold that we should not now subject either of the accused to any further punishment than has already been suffered by them through the publicity of this prosecution, and this record of our disapproval of the contract made by them with the Merchants Protective Corporation as unprofessional.

MAIN, C. J., CHADWICK, FULLERTON, MOUNT, MITCHELL, TOLMAN, and HOLCOMB, JJ., concur.

MACKINTOSH, J., took no part.

[No. 24. *En Banc.* November 19, 1918.]

In the Matter of the Proceedings for the Disbarment of RICHARD GOWAN.[1]

ATTORNEY AND CLIENT (7, 7-1)—DISBARMENT—GROUNDS—MISAPPROPRIATIONS. The misappropriation, with intent to defraud, of money collected by an attorney in his professional character, is ground for his disbarment; and it is not a purgation of his offense that he returned the money after being charged with embezzlement.

Proceeding filed in the supreme court February 16, 1918, for the disbarment of an attorney, upon the findings of the state board of law examiners against the accused. Judgment of Disbarment.

The Attorney General and *Hance H. Cleland* and *R. M. Burgunder, Assistants,* for the state.

Richard Gowan, in propria persona.

[1]Reported in 176 Pac. 7.

MITCHELL, J.—Richard Gowan, properly admitted, has been practicing law in this state for a number of years. He has been charged with violations of his oath and duties as an attorney and counselor at law in the commission of acts involving moral turpitude, dishonesty and corruption. To the complaint an answer containing general denials was interposed, upon which issues a hearing was had before the state board of law examiners, whose findings, with all the evidence in the cause, have been reported for review by this court in accordance with its rules and chapter 115, Laws of 1917, p. 421.

An examination of the proof, in the face of some denials and evasion on the part of Mr. Gowan, fully satisfies us of conduct on his part that is deceitful and unprofessional.

(1) In January, 1917, a claim was placed with him, for collection, by one Sidelsky. Failing to collect, he was, at his own suggestion, authorized to institute suit in the justice of the peace court in April, 1917. He asked and received $3 to cover the cost of filing the suit and for service of process. Suit was not commenced. Shortly, however, and several times, he informed his client that judgment had been obtained. About August, 1917, the debtor, casually learning Sidelsky claimed to hold a judgment against him, told Sidelsky that no papers had been served on him, that there was no judgment against him, and offered to pay the debt, which offer was refused, without the advice of Mr. Gowan, who, on being spoken to, told Sidelsky not to accept unless costs were also paid. The debtor then offered to pay Mr. Gowan, who would not accept pay without costs, claiming that if he, the debtor, was not served with process his wife was, and that there was a judgment against him. Sidelsky ex-

amined and found there was no judgment, upon report of which Mr. Gowan became abusive to him. Within a day or two, the debtor paid Sidelsky, and just as the receipt was passed, Mr. Gowan appeared and handed the debtor process and complaint in suit, together with written notice of claim of lien for attorney's fee of $5, whereupon Mr. Gowan was notified by his client that the debt had just been paid. Mr. Gowan then abused both his client and the former debtor. Within a few days Sidelsky personally dismissed the suit in the justice of the peace court. Mr. Gowan undertakes to partially excuse his deceit by saying he thinks he must have left the business of the service of process and filing of the suit to a stranger who stopped in his office a few weeks in April, and whose name he does not well remember and whose whereabouts are now unknown to him, although he admits there is no other instance in which he had the stranger perform such work.

(2) One Mrs. Gunderson employed Mr. Gowan to collect money due her. He instituted suit, collected $50, and then obtained judgment for the balance, $78.04. He received the amount of, and satisfied, the judgment in full, as attorney of record. Of the $50 collected before judgment he retained $25 on his attorney fee, and paid the rest to his client. After collecting and satisfying the judgment, he first denied having received the money. Later, he admitted to his client he had received and used it and was then trying to mortgage personal property to raise money to pay her. Repeated fruitless efforts to collect induced her to report the matter to the office of the prosecuting attorney. To a deputy in such office Mr. Gowan admitted he had used the money. His promise to pay his client being unkept, the prosecuting attor-

ney's office, after a few days, filed a complaint and had Mr. Gowan arrested on a charge of embezzlement. On the next day, retaining another $25 on his attorney's fee and $4 clerk's fee for filing the Gunderson suit, he sent the remainder of $78.04, viz., $49, to Mrs. Gunderson by post office money order.

The attempt of Mr. Gowan to palliate this unprofessional conduct and the wrong to his client is so flimsy and labored we decline to discuss it. We are quite satisfied it is a case of the misappropriation of a client's money with intent to defraud. The misappropriation or misapplication of money or property received by an attorney in his professional character is one of the most frequent grounds of disbarment. Although we have a statute on the subject, none is needed to authorize, nor will the courts hesitate to declare, disbarment in such case as this. The chief consideration is not of a client who has already been offended, but, rather, that the exhibition of that wrong discovers the character of the attorney and his unfitness to be trusted; and, while the payment of the money fraudulently used releases the attorney from civil liability, it is not a purgation of his offense, nor does it prove that he has become a fit person to remain on the rolls.

The order will be, therefore, that the attorney be disbarred and his license to practice law in this state annulled.

ALL CONCUR.

[No. 7. *En Banc.* November 19, 1918.]

In the Matter of the Proceedings for the Disbarment of N. L. WARD.[1]

ATTORNEY AND CLIENT (7, 7-1)—DISBARMENT—GROUNDS—MISAPPROPRIATIONS. The receipt of fees by an attorney while acting as administrator, for which he has not accounted, is ground for disbarment.

Proceeding filed in the supreme court March 20, 1918, for the disbarment of an attorney, upon findings of the state board of law examiners against the accused. Judgment of Disbarment.

The Attorney General and *R. M. Burgunder, Assistant,* for the state.

McGill & McKenney, McMaster, Hall & Drowley, and *N. B. Brooks,* for accused.

FULLERTON, J.—This is a proceeding for the disbarment of N. L. Ward. The state board of law examiners, before whom the hearings were had, made specific findings of sums of money, received by the attorney while acting as an administrator, for which he has not accounted. The findings are not disputed, the only defense offered being a plea in extenuation. But we cannot think the plea in any manner mitigates the offense.

The order is, therefore, that the defendant be disbarred and his license to practice law in this state annulled.

ALL CONCUR.

[1]Reported in 176 Pac. 2.

[Nos. 14667, 14870, 14871. *En Banc.* November 19, 1918.]

SPOKANE & INLAND EMPIRE RAILWAY COMPANY, YAKIMA VALLEY TRANSPORTATION COMPANY, AND WASHINGTON WATER POWER COMPANY, *Appellants,* v. JOHN M. WILSON *et al., Industrial Insurance Commissioners, Respondents.*[1]

MASTER AND SERVANT (20-1)—LIABILITY FOR INJURY TO SERVANT—WORKMEN'S COMPENSATION—ACT EXEMPTING INTERSTATE RAILWAYS—CONSTRUCTION. Under the amendment (Laws 1917, p. 96, § 18; Rem. Code, § 6604-18) providing that the workmen's compensation act shall not apply to employees of railways doing interstate, foreign, and intrastate commerce, and substituting therefor the liability imposed by the Federal employers' liability act, it is immaterial whether an injured employee was engaged in intrastate or interstate commerce, if any portion of the railroad's business is interstate; it being the intention to classify employers and render them liable under the Federal act regardless of the nature of the work (TOLMAN and FULLERTON, JJ., dissent).

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered November 20, 1917, in favor of the defendants, dismissing consolidated actions to exclude plaintiffs from the requirements of the industrial insurance act, after a trial to the court on the merits. Reversed.

Richards & Fontaine, for appellant Yakima Valley Transportation Company, cited: *State ex rel. Jarvis v. Daggett,* 87 Wash. 253, 151 Pac. 648, L. R. A. 1916A 446; *State v. Bates & Rogers Construction Co.,* 91 Wash. 181, 157 Pac. 482; *New York Cent. R. Co. v. Winfield,* 244 U. S. 147; *Erie R. Co. v. Winfield,* 244 U. S. 170; *Pederson v. Delaware, L. & W. R. Co.,* 229 U. S. 146, Ann. Cas. 1914C 153; *Colasurdo v. Central R. Co.,* 180 Fed. 832.

[1]Reported in 176 Pac. 34.

Post, Russell, Carey & Higgins, for appellant Washington Water Power Company, contended, among other things, that complainant is engaged in interstate commerce. *Railroad Commission of Louisiana v. Texas & P. R. Co.,* 229 U. S. 336; *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* 219 U. S. 498; *Railroad Commission of Ohio v. Worthington,* 225 U. S. 101; *Texas & N. O. R. Co. v. Sabine Tram Co.,* 227 U. S. 111; *Atchison, T. & S. F. R. Co. v. Harold,* 241 U. S. 371; *Gibbons v. Ogden,* 9 Wheat. (22 U. S.) 1, 188; *West v. Kansas Natural Gas Co.,* 221 U. S. 229, 35 L. R. A. (N. S.) 1193; *Landon v. Public Utilities Commission of Kansas,* 242 Fed. 658, 684; *Hagerla v. Mississippi River Power Co.,* 202 Fed. 776, 785, 786.

Graves, Kizer & Graves, for appellant Spokane & Inland Empire Railway Company, contended, among other things, that the decisions between 1911 and 1917 render it extremely doubtful as to when a railroad employee is engaged in interstate commerce. *Delaware, L. & W. R. Co. v. Yurkonis,* 238 U. S. 439; *Shanks v. Delaware, L. & W. R. Co.,* 239 U. S. 556; *Chicago, B. & Q. R. Co. v. Harrington,* 241 U. S. 177; *New York Cent. & H. R. Co. v. Carr,* 238 U. S. 260.

Power plant employees are engaged in interstate commerce. *Horton v. Oregon-Washington R. & Nav. Co.,* 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8; *Tacoma v. Nisqually Power Co.,* 57 Wash. 420, 107 Pac. 199; *State ex rel. Lyle Light, Power & Water Co. v. Superior Court,* 70 Wash. 486, 127 Pac. 104; *State ex rel. Weyerhaeuser Timber Co. v. Superior Court,* 71 Wash. 84, 127 Pac. 591.

While shop men are not. *Shanks v. Delaware, L. & W. R. Co.,* 239 U. S. 556; *Minneapolis & St. L. R. Co. v. Winters,* 242 U. S. 353, Ann. Cas. 1918B 54.

Trackmen are engaged in interstate commerce. *Pederson v. Delaware, L. & W. R. Co.,* 229 U. S. 146, Ann. Cas. 1914C 153.

The amendment would not exempt the persons engaged in those varying occupations, although they might be employees of a company which owned and operated a railroad. *Southern Pac. Co. v. Jensen,* 244 U. S. 205, Ann. Cas. 1917E 900.

The Attorney General and *John A. Homer, Assistant,* for respondents, contended, *inter alia,* that the decisions construing the Federal employers' liability act are more or less pertinent, first, by reason of the fact that the Federal act is made to apply to "common carriers by railroad" engaging in interstate commerce, while the amendment to the state act excludes "railroads" engaged in interstate commerce; and secondly, because of the evident intent of the legislature to extend the provisions of the state act to every hazardous work, but with an equally evident desire to avoid legislating with respect to matters within the exclusive jurisdiction of the Federal government. *Lehigh Valley R. Co. v. Barrow,* 244 U. S. 183; *Bay v. Merrill & Ring Logging Co.,* 243 U. S. 40; *McCluskey v. Marysville & N. R. Co.,* 243 U. S. 36; *Chicago, B. & Q. R. Co. v. Harrington,* 241 U. S. 177; *Horton v. Oregon-Washington R. & Nav. Co.,* 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8; *Shanks v. Delaware, L. & W. R. Co.,* 239 U. S. 556; *Cousins v. Illinois Central R. Co.,* 126 Minn. 172, 148 N. W. 58; *Delaware, L. & W. R. Co. v. Yurkonis,* 238 U. S. 439; *New York Central R. Co. v. Winfield,* 244 U. S. 147, Ann. Cas. 1917D 1139. See, also, the following cases: *Southern Pac. Co. v. Jensen,* 244 U. S. 205, Ann. Cas. 1917E 900; *Illinois Central R. Co. v. Behrens,* 233 U. S. 473, Ann. Cas. 1914C 163; *Erie R. Co. v. Welsh,* 242 U. S. 303; *Minneapolis*

& St. L. R. Co. v. Winters, 242 U. S. 353, Ann. Cas. 1918B 54; *New York Central R. Co. v. White,* 243 U. S. 188, Ann. Cas. 1917D 629; *Giovio v. New York Central R. Co.,* 176 App. Div. 230, 162 N. Y. Supp. 1026; *Killes v. Great Northern R. Co.,* 93 Wash. 416, 161 Pac. 69.

The interstate commerce act does not apply to street railways. *Omaha & C. B. St. R. Co. v. Interstate Commerce Commission,* 230 U. S. 324, 46 L. R. A. (N. S.) 385; *Front Street Cable R. Co. v. Johnson,* 2 Wash. 112, 25 Pac. 1084, 11 L. R. A. 693.

The word "railroad" does not include street railways. *Norfolk & Portsmouth Traction Co. v. Ellington's Adm'r,* 108 Va. 245, 61 S. E. 779, 17 L. R. A. (N. S.) 117; *Cedar Rapids & M. C. R. Co. v. Cedar Rapids,* 106 Iowa 476, 76 N. W. 728; *Funk v. St. Paul City R. Co.,* 61 Minn. 435, 63 N. W. 1099, 52 Am. St. 608, 29 L. R. A. 208; *Lincoln Traction Co. v. Webb,* 73 Neb. 136, 102 N. W. 258, 119 Am. St. 879; *Daly v. Milwaukee Elec. R. & Light Co.,* 119 Wis. 398, 96 N. W. 832, 100 Am. St. 893; *Lincoln Street R. Co. v. McClellan,* 54 Neb. 672, 74 N. W. 1074, 69 Am. St. 736; *Omaha Street R. Co. v. Boesen,* 74 Neb. 764, 105 N. W. 303, 4 L. R. A. (N. S.) 122; *Railroad Co. v. Board of Railroad Com'rs,* 73 Kan. 168, 84 Pac. 755; *State v. Cain,* 69 Kan. 186, 76 Pac. 443; *Manhattan Trust Co. v. Sioux City Cable R. Co.,* 68 Fed. 82; *Massillon Bridge Co. v. Cambria Iron Co.,* 59 Ohio St. 179; *Louisville & P. R. Co. v. Louisville City R. Co.,* 2 Duv. (63 Ky.) 175; *O'Malley v. Board of Com'rs of Riley County,* 86 Kan. 752, 121 Pac. 1108, Ann. Cas. 1913C 576; *In re New York District R. Co.,* 107 N. Y. 42, 14 N. E. 187; *Board of Railroad Com'rs v. Market Street R. Co.,* 132 Cal. 677, 64 Pac. 1065; *Thompson-Houston Elec. Co. v. Simon,* 20 Ore. 60, 25 Pac. 147, 23 Am. St. 86, 10 L. R. A. 251; *Sams v. St. Louis & M. R. Co.,* 174 Mo. 53, 73 S. W. 686, 61 L. R. A. 475; *State v.*

Duluth Gas & Water Co., 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63; *Gyger v. Philadelphia City P. R. Co.*, 136 Pa. St. 96 (*Appeal of Montgomery*, 20 Atl. 399), 9 L. R. A. 369; *Riley v. Galveston City R. Co.*, 13 Tex. Civ. App. 247, 35 S. W. 826; *Sears v. Marshalltown St. R. Co.*, 65 Iowa 742, 23 N. W. 150; *Freiday v. Sioux City Rapid Transit Co.*, 92 Iowa 191, 60 N. W. 656, 26 L. R. A. 246.

The Federal employers' liability act does not apply to street railways, although extended to interurban lines running between two states. *Kiser v. Metropolitan St. R. Co.*, 188 Mo. 169, 175 S. W. 98; *Spokane & Inland Empire R. Co. v. Campbell*, 241 U. S. 497; *Washington R. & Elec. Co. v. Scala*, 244 U. S. 630.

Power plant employees are not engaged in interstate commerce. *Altoona v. Leary*, 254 Pa. 25, 98 Atl. 798; *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177; *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439.

The words "operation of railroads," in the act of 1917, does not have a meaning other than it had in other parts of the act, so as to include the operation of power plants. *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556; *State v. Chicago, M. & P. S. R. Co.*, 80 Wash. 435, 141 Pac. 897.

MAIN, C. J.—These three actions against the industrial insurance commission, where the appellants seek to be excluded from the operation of the workmen's compensation act, all call for the interpretation of the amendment to § 18 thereof (Rem. Code, § 6604-18), contained in Laws of 1917, page 96, which reads as follows:

"Inasmuch as it has proved impossible in the case of employees engaged in maintenance and operation of railways doing interstate, foreign and intrastate

commerce, and in maintenance and construction of their equipment, to separate and distinguish the connection of such employees with interstate or foreign commerce from their connection with intrastate commerce, and such employees have, in fact, received no compensation under this act, the provisions of this act shall not apply to work performed in the maintenance and operation of such railroads or performed in the maintenance or construction of their equipment, or to the employees engaged therein, but nothing herein shall be construed as excluding from the operation of this act railroad construction work, or the employees engaged thereon: *Provided, however,* That common carriers by railroad engaged in such interstate or foreign commerce and in intrastate commerce shall, in all cases where liability does not exist under the laws of the United States, be liable in damages to any person suffering injury while employed by such carrier, or in the case of the death of such employee to his surviving wife and child or children, and if no surviving wife or child or children, then to the parents, sisters, or minor brothers, residents of the United States at the time of such death and who were dependent upon such deceased for support, to the same extent and subject to the same limitations as the liability now existing, or hereafter created, by the laws of the United States governing recoveries by railroad employees injured while engaged in interstate commerce."

I. The Spokane & Inland Empire Railway Company operates an electric system of railways consisting of street car lines in Spokane and suburban and interurban lines into Spokane, two of the interurban lines extending into the state of Idaho. The company also operates an electric power plant on the Spokane river. All of these operations are under one control and are conducted as a whole. The interurban railway lines constitute the greater portion of the company's business. The number of employees on the

interurban and street car lines cannot be segregated, since the street car lines are combined with suburban lines in so far as the operation of cars, the repair shops and the care of tracks are concerned. The power generated by the power department is used principally for railroad purposes, from fifteen per cent to twenty-five per cent being sold commercially. The power sold is what is known as "surplus" power, which is available only when the river is at its higher stages. There is no segregation of expenses in the power department between that required to generate the power used for railroad purposes and that sold commercially, nor is there any segregation possible with respect to the power used for the movement of interstate and intrastate traffic. The urban cars carry no interstate traffic, but interstate trains run and interstate traffic is carried over all portions of the street car lines.

II. The Washington Water Power Company operates an electric car system in and about the city of Spokane, which system consists of twenty routes, all of them except one being operated exclusively for the carrying of passengers in and about the city of Spokane. On one line, operating principally for the carriage of passengers wholly within this state, the cars carry mail coming from and destined to points outside of the state. In addition to the urban routes the company operates an electric interurban railway extending from Spokane to Cheney, with two branches from that point. The tracks of this line are wholly within the state. This interurban line is used, in addition to carrying intrastate passengers and freight, in carrying express, freight and mail, some of which is transported in continuous passage between points on the interurban line and points in other states, the

tracks being physically connected with the tracks of the Northern Pacific Railway, the Great Northern Railway, the Spokane & Inland Empire Railway, the Oregon & Washington Railway and the Chicago, Milwaukee & St. Paul Railway, so that it is possible to interchange cars between the interurban tracks and the tracks of these connecting interstate carriers. The tracks of the interurban line are also physically connected with the plaintiff's urban tracks in the city of Spokane, and cars operated in the interurban service use many of the urban tracks within the city. The company also operates electric power plants located on the Spokane river, in the state of Idaho and at Spokane, Long Lake and Little Falls, in the state of Washington. The power generated is used in the operation of the urban car system, in the operation of the interurban lines, furnishing light to the city of Spokane, and for supplying numerous cities and towns in Washington and Idaho with power and light, and for general commercial purposes. The entire business is conducted under one management, and to separate and distinguish the employees engaged in interstate commerce from those engaged in intrastate commerce would be nearly impossible.

III. The Yakima Valley Transportation Company operates an urban and interurban railroad system in and about the city of Yakima. The tracks of the company are physically connected with the Oregon & Washington and the Northern Pacific Railway tracks, and receive from those interstate carriers freight in car-load lots, ninety per cent of the freight handled by the company being interstate business. One system of tracks is used for both urban and interurban service, and cars engaged in carrying city passengers and transporting interstate passengers and cars trans-

porting freight, mail and express in interstate commerce, pass over the tracks alternately one with the other. Freight is received at all points on the company's line and through bills of lading are issued to all points in the United States and Canada. Freight is billed from points outside of the state to points on the company's lines and received and delivered at its stations on through bills of lading. The same employees are engaged in maintaining the tracks used in all service performed by the company, the car shops and car barns are used in both classes of service, the same men working on the equipment used in interstate and intrastate business. The executive officers and office employees perform services without regard to whether the business they are engaged upon is interstate or intrastate. The operators of the cars are engaged part of the time on one class and part of the time on the other class of service.

When the workmen's compensation act (Rem. Code, § 6604-1 *et seq.*) was passed in 1911, it was anticipated that there had been substituted for the common law liability of employers a sure and certain compensation for all railroad employees except those who come within the Federal employers' liability act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1916, §§ 8657-8665]). Under the operation of the law, however, it became apparent that, as stated in the amendment of 1917 (Laws 1917, p. 96, § 18), a great deal of confusion arose in cases of employees engaged upon railroads doing both interstate and intrastate business. From the statement of the business engaged in by the three companies involved in these suits, it is apparent that great numbers of employees are engaged in work so impossible of segregation as to whether it is at any given time inter-

state or intrastate that the question of whether they came within the state law or the Federal law is impossible of determination. In attempting to remedy this situation and, at the same time, not to remit employees to the uncertainty of the common law liability, the amendment of 1917 was enacted; and, as we view it, that act, instead of attempting to segregate employees into two classes—those engaged in interstate and those engaged in intrastate work—in effect, said that it matters not whether the employees are engaged in interstate or intrastate work so long as the company for which they were working was a railroad actually engaged to some extent in doing an interstate, foreign or intrastate commerce. In other words, the character of the business of the railroad company determines the status of the employees, and if a portion of the railroad company's business is interstate, the employees engaged in its maintenance and operation, or in the maintenance and construction of its equipment, should not come within the operation of the state law, but that all such employees could recover in the state courts, not under the common law liability, but under the liability imposed under the amendment, which is the same liability fixed by the United States in the Federal employers' liability act. To give this amendment any other construction would be to read something into it which it does not contain; and to attempt to construe it with reference to the proportion of the company's business which may be interstate and apply the amended act only to such companies whose interstate business bears a certain proportion to their entire business, is not only rewriting the amendment, but also perpetuating and increasing the confusion which the amendment recognized and sought to obviate. Under this interpretation of the

act, the employee is the beneficiary of a clear definition of his status; for, if his employer is a railroad company a portion of whose business is interstate, he knows, by reason of that fact, that his remedy for an injury received is not compensation under the workmen's compensation act, but that he has the same protection in the state courts which the Federal act gives to employees of interstate railroad companies.

We see no merit in the contention that, because a railroad company is principally engaged in intrastate activity, its employees should receive the benefits of the workmen's compensation act. The certainty and uniformity which the original act sought to provide is furnished by the amendment, which, by classifying employers, makes certain to the employee his status and determines the law under which he will receive compensation. To interpret this amendment in any other way would, to our mind, lead to confusion worse confounded. In place of the uncertainty and practical impossibility of determining whether employees should be classified as being engaged in interstate and intrastate work, the amendment gives all the employees in maintenance and operation and maintenance and construction of equipment of a railroad actually doing an interstate business as a portion of its general railroad business, the benefit of the same rules of liability provided by the Federal government in cases against interstate carriers.

The action of the lower court in denying the relief sought was erroneous. A decree will be entered that appellants are not amenable to the jurisdiction of the industrial insurance commission, and restraining that commission from making any demand upon appellants for premiums under the workmen's compensation act

for its employees engaged in maintenance and operation or in maintenance and construction of equipment.

CHADWICK, HOLCOMB, MOUNT, PARKER, and MACKINTOSH, JJ., concur.

TOLMAN and FULLERTON, JJ., dissent.

[No. 14828. *En Banc.* November 19, 1918.]

CARL JOHANNESSEN, *Respondent*, v. WASHINGTON WATER POWER COMPANY, *Appellant*.[1]

STREET RAILROADS (30) — OPERATION — ACTIONS FOR INJURIES — CONTRIBUTORY NEGLIGENCE OF PEDESTRIAN—QUESTION FOR JURY. The contributory negligence of a pedestrian struck by an interurban train is a question for the jury, where he looked and saw no train for a distance of 1,500 feet, and walked parallel with the track 140 feet, and started to cross without again looking (MOUNT and MACKINTOSH, JJ., dissenting).

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered January 4, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by an electric train. Affirmed.

Post, Russell & Higgins, for appellant.

H. M. Stephens and *William S. Lewis*, for respondent.

TOLMAN, J.—This action was brought by the respondent to recover damages for personal injuries which he received by being struck by an interurban electric train operated by the appellant, at the intersection of Tenth avenue (there commonly known as Sunset Boulevard) and "D" street, within the corporate limits of the city of Spokane, on October 9, 1916.

[1]Reported in 176 Pac. 8.

The appellant has a double track car line extending from the central portion of the city southwesterly to the place of the accident and beyond, over which it runs a street car commonly known as the Garden Springs car, and also its Medical Lake and Cheney interurban cars. All west-bound street and interurban cars outward bound run on the north track, and all east-bound cars run toward the city on the south track. At the place of the accident, the double track car line occupies the center of Tenth avenue, or Sunset boulevard, which center part of the street occupied by the tracks is unpaved; and on each side of the unpaved portion of the street containing the tracks is a paved roadway approximately twelve feet in width, with a six-inch curb on the outside next to the sidewalk line, and a four-inch curb on the inside next to the car tracks. There are no sidewalks along this street in the vicinity of the place of the accident, and the paved roadway is commonly used by pedestrians as well as vehicles.

Shortly before the accident happened, the Garden Springs street car, used by the residents of the vicinity in going to and coming from the city, had gone out on the north track toward Garden Springs; and, at the time of the accident, was returning, though still distant a block or so from the point where the accident occurred, which point was the usual and customary place for persons in that vicinity to board the street car.

Respondent is a man seventy years of age and, on the morning of the accident, was in good health and in possession of all of his faculties. He resides east of the city of Spokane, and early that morning had come into Spokane and taken the Garden Springs car to the place of the accident, where he had alighted

from the car and gone to call upon his daughter, who resided in the immediate vicinity. Shortly before 10 a. m., the respondent, carrying a small satchel in his hand, left his daughter's house to take the Garden Springs car for the purpose of returning to the city. Walking down the path from his daughter's house, accompanied by his daughter and another lady, the respondent reached the curb on the north side of Tenth avenue at a point about 140 feet east and some twelve feet north from the place of the accident. He stopped at the six-inch curb and looked to his left down Sunset boulevard in the direction from which outbound cars would come, and had an unobstructed view of the double tracks for a distance of something like fifteen hundred feet, and he testifies that no car was then in sight. His daughter and her companion also looked and saw no car. Leaving the women, the respondent walked in a southwesterly direction across the north paved portion of the street toward the four-inch curb next to the north car track, and while so proceeding across the driveway, a man in an automobile going toward the city on the south side of the street asked him to ride. The respondent stopped, declined the invitation, and again looked to the left, but saw no car then in sight. He then continued to walk toward the curb next to the north car track until somewhat past the center of the paved driveway, and then turned and walked along the driveway towards "D" street at a distance of two or three feet from the four-inch curb, but approaching nearer to the curb as he neared the intersection of "D" street, for the purpose of permitting west-bound traffic to pass him from behind. Respondent pursued this course until he had passed beyond the end of the curb and into the paved crossing at the intersection of "D" street.

Then, without looking for the approach of the car, he turned and took a step or two to the left for the purpose of crossing to the south side of the south track, there to take the inbound Garden Springs car, and, according to his testimony, was about to the north rail of the north car track when he was struck by the appellant's interurban train.

It is alleged that the interurban train was running at a speed in excess of twenty miles an hour and in violation of a city ordinance which is pleaded. The evidence is conflicting as to whether or not the train was running in excess of twenty miles an hour; and the evidence is also conflicting as to whether or not any warning was given by the motorman of the interurban train by sounding a bell or whistle.

At the time and place of the accident, there was nothing to obstruct the view in any direction of either the respondent or the motorman. The motorman testifies that he saw the respondent at a distance of at least six hundred feet; that the respondent was walking parallel with the track outside the danger zone; that the bell was rung for the crossing as usual at a distance of about one hundred and fifty feet from the place of the accident, was rung again at a distance of about twenty feet, and that as the car came within about twelve feet of the respondent he turned toward the track, when the motorman again rang the bell, threw on the emergency brakes and shouted to the respondent, but the means then used were insufficient to avoid the accident.

The appellant admits on oral argument that, upon the question of excessive speed and upon the question of whether or not the bell was sounded, there was sufficient evidence to go to the jury, but claims that it affirmatively appears that the respondent was guilty

of contributory negligence *per se*. At the close of the respondent's case, the appellant challenged the sufficiency of the evidence and moved for judgment, which motion was denied; and at the close of the entire case, the appellant renewed its challenge and motion. These motions were denied and an exception taken. The jury returned a verdict in favor of the respondent, and the appellant thereupon made a motion for judgment notwithstanding the verdict, and also made a motion for a new trial, both of which were denied and exceptions taken. A judgment was entered on the verdict, from which this appeal is prosecuted.

It is not difficult to state a general rule of what is or is not contributory negligence, but frequently it is extremely difficult to apply a general rule to the specific facts, and in doing so it is not strange that some confusion appears to have arisen among the decisions of this court.

Among the earlier leading cases, the one most frequently cited is *Roberts v. Spokane St. R. Co.*, 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184, in which this court said:

"It is not negligence *per se* if it is not shown that one looked and listened in crossing a street railway. The degree of care required in crossing a highway and steam railway, in looking up and down the track, is not necessarily the test of care required in crossing the track of a street railway in a public street. Failure to look and listen before crossing the tracks of an electric railway in a public street, where the cars have not the exclusive right of way, is not negligence as a matter of law." (Citing cases from other states.)

In *Traver v. Spokane St. R. Co.*, 25 Wash. 225, 65 Pac. 284, the court, at page 237, said:

"The obligations of the operator of the car and his (respondent's) obligations were mutual. Each was

obligated to look out for the other, and govern his movements accordingly."

In *Burian v. Seattle Elec. Co.*, 26 Wash. 606, 67 Pac. 214, in which the facts were quite similar to those in the case at bar, the court said:

"Conceding that the record as it stands shows that no gong was rung, still respondent urges that appellant was so palpably guilty of gross contributory negligence, as a matter of law, it should be held he cannot recover. It is true, it does not appear that he looked or listened for the approach of a car, and in turning to cross the respondent's track he did not turn in the direction from which he knew a car upon that track must come. It has been held by this court that failure to look or listen at a street railway crossing does not constitute negligence *per se*. *Roberts v. Spokane Street Ry. Co.*, and *Traver v. Spokane Street Ry. Co., supra.* A distinction is made in those cases between the rule which applies to a street railway crossing and that which applies to the crossing of an ordinary railroad, the reason being that a railroad company has a proprietorship in its right of way, and that a greater degree of care is required at a crossing of its tracks than is required at the crossing of a street railway track, the owner of which has no proprietorship in the street, and has only a right upon the street in common with other travelers thereon. The above distinction is supported by the weight of authority. Following the above named cases it must be held here that the mere failure of appellant to look or listen was not negligence as a matter of law, but it is a question to be submitted to the jury whether, when considered in connection with all other surroundings in this case, it constituted negligence in fact. The jury might have found that it was appellant's duty, under his peculiar surroundings, which were well known to him, to turn toward the direction from which the car came and look, or that he at least should have listened. Again, they might have found that circumstances and surroundings were such as did not charge him with that duty. Under the record they might

also have found that the failure to ring the gong was negligence, and that, if the gong had sounded the alarm, appellant might have heard it in time to have protected himself. These are questions which, we think, must be submitted to the jury. Under our system of jurisprudence the jury is constituted the functionary which must pass upon these questions of fact. It is not a question of what may be our individual opinions as to the facts shown by the record. The law casts that duty upon the jury as a distinct and auxiliary branch of the court, and unless the evidence shows negligence on the part of the appellant as a matter of law, it is his right to have the facts submitted to a jury. This court has held that generally the question of contributory negligence is for the jury to determine from all the facts and circumstances of the particular case, and that it is only in rare cases that the court is justified in withdrawing it from the jury; that there may be cases where the circumstances are such that the standard of duty is fixed and the measure of duty defined by law, and is the same under all circumstances; and again, that the facts may be undisputed, and may be such as prevent more than one reasonable inference being drawn from them. If, however, different results might be honestly reached by different minds, then negligence is not a question of law, but is one of fact for the jury, and before the court will be justified in taking from the jury the question of contributory negligence the acts done must be so palpably negligent that there can be no two opinions concerning them. *McQuillan v. Seattle,* 10 Wash. 464 (38 Pac. 1119, 45 Am. St. Rep. 787); *Steele v. Northern Pac. R. Co.,* 21 Wash. 287 (57 Pac. 820); *Traver v. Spokane St. R. Co., supra.* The above principle we believe is sustained by the weight of authority. It has, in any event, become the settled doctrine of this court."

And the cases of *Chisholm v. Seattle Elec. Co.,* 27 Wash. 237, 67 Pac. 601, and *Niemyer v. Washington Water Power Co.,* 45 Wash. 170, 88 Pac. 103, are in

harmony with the decisions just referred to, and recognize the rule of reciprocal duty.

What appears to be a divergence from the rule so far followed occurs in *Helliesen v. Seattle Elec. Co.*, 56 Wash. 278, 105 Pac. 458, where, after discussing the previous cases, the court said:

"Did the pedestrian, under all the circumstances, use such a degree of care, caution and prudence as an ordinary, prudent and careful pedestrian would use under like circumstances?"

This is the rule which the court has attempted to follow in some of the later cases, but in doing so it has nowhere repudiated the doctrine of reciprocal duties. See *Fluhart v. Seattle Elec. Co.*, 65 Wash. 291, 118 Pac. 51; *Slipper v. Seattle Elec. Co.*, 71 Wash. 279, 128 Pac. 233; *Stueding v. Seattle Elec. Co.*, 71 Wash. 476, 128 Pac. 1058; *Bardshar v. Seattle Elec. Co.*, 72 Wash. 200, 130 Pac. 101; *Beeman v. Puget Sound Traction, L. & P. Co.*, 79 Wash. 137, 139 Pac. 1087; *Arpagaus v. Washington Water Power Co.*, 86 Wash. 83, 149 Pac. 346; *Jones v. Wiese*, 88 Wash. 356, 153 Pac. 330; *McEvilla v. Puget Sound Traction, Light & Power Co.*, 95 Wash. 657, 164 Pac. 193.

In a number of these cases, referring to the particular facts in the case then under consideration, the court has said that the pedestrian must use his senses, which seems to limit and narrow the look and listen rule; for surely, if one uses neither the sense of sight or hearing, it is not reasonable to suppose that the use of his other senses will protect him from colliding with a moving street car. In these cases calling for the use of the senses, the court either found facts which created in each case an exception to the earlier rule, or else encroached upon that rule, perhaps un-

consciously, as the earlier cases have been cited and referred to from time to time, and no departure appears to have been intended.

In the *Beeman* case, *supra*, JUDGE CHADWICK, speaking for the court, said:

"Whether a pedestrian should have known of the approach of a street car would no doubt be, in almost any conceivable case, a question for the jury; but when admitting that he knew it, there is a duty—not a duty owing to another, but a duty owing to self—to keep in mind the fact that a car is approaching."

There was evidence in this case from which the jury may have found that the motorman, for a distance of fifteen hundred feet or more, could and did see the respondent, and must have known that he was walking with his back toward the approaching car, in close proximity to the tracks, and likely any moment to step into danger. The jury may have found from the evidence that the respondent was wholly unconscious of the approach of the car until the instant that it struck him; indeed, that seems admitted. And there was evidence also from which the jury may have found that the car was proceeding at an excessive rate of speed and that no warning was given. It is argued here, and may have been argued to the jury, that, when respondent looked for the approach of a car when he was at a point one hundred and forty or one hundred and fifty feet from the place of the accident, he could see the track for such a distance that it was prudent to believe he could reach and cross the tracks at "D" street before any car traveling at a lawful rate of speed could reach him; and that, at any rate, an approaching car would give abundant warning. Can we say that reasonable minds cannot differ as to whether or not the respondent should have known of the approach of the car, or again looked before entering

the danger zone? In view of the reciprocal duties of the parties, we think it is a question for the jury, even under the restricted rule (if there be such), to say whether or not respondent, under all the circumstances, acted as an ordinarily prudent person would act under like circumstances. The arguments made to us by both sides seem to be proper arguments to be made to the jury upon this question, and we think the trial court properly submitted it to the jury under the authority of the following: *Bemiss v. Puget Sound Traction, Light & Power Co.*, 89 Wash. 239, 154 Pac. 171; *O'Brien v. Washington Water Power Co.*, 71 Wash. 688, 129 Pac. 391; *Peterson v. Seattle Elec. Co.*, 71 Wash. 349, 128 Pac. 650; *Richmond v. Tacoma R. & Power Co.*, 67 Wash. 444, 122 Pac. 351; *Morris v. Seattle, Renton & Southern R. Co.*, 66 Wash. 691, 120 Pac. 534; *Mallett v. Seattle, Renton & Southern R. Co.*, 66 Wash. 251, 119 Pac. 743.

We find no error in the instructions given to the jury.

The judgment will be affirmed.

MAIN, C. J., FULLERTON, PARKER, MITCHELL, and HOLCOMB, JJ., concur.

CHADWICK, J., concurs in the result.

MOUNT, J. (dissenting)—I cannot agree to the conclusion reached by the majority. The facts are to the effect that the respondent was walking along a paved boulevard parallel with the street railway tracks. The portion of the street containing the double track railway was the ordinary graveled street, with ties and rails. There was a curb four inches high separating the paved roadway from the car tracks. The respondent was walking leisurely along the paved roadway a couple of feet distant from the curb and

parallel with the railway tracks. He was possessed of all his senses. His hearing and eyesight were good. There was nothing upon the street to distract his attention. While the place where he was injured was within the city limits, it was practically in the country. There was no traffic near. While he was thus walking, he came to "D" street, which was a paved crossing over the railway tracks. When he came to this crossing he started across the tracks. As he turned to his left and was about to step upon the tracks, the corner of the street car struck him upon the left shoulder and injured him.

I think the majority of the court will agree that, if the respondent had been traveling at right angles to the boulevard for the distance of one hundred and forty feet and came to the street car track and attempted to step upon the track immediately in front of the street car, he would have been guilty of such negligence as to preclude a recovery, because, coming for that distance at right angles to the street car track, he, of necessity, must have seen the street car approaching, even at an excessive rate of speed, and if he had walked upon the track in front of the car, he would have been guilty of the grossest negligence; but, because he was walking parallel with the track, had looked down the track when he first came upon the street and saw no car coming at a distance of fifteen hundred feet, and because he walked parallel with the street car track up to "D" street crossing, a distance of one hundred and forty feet, and then turned to his left to cross the track, and was struck by the car, the majority say that this made a question for the jury. If the respondent had been an instant later he would have walked into the side of the street car as it passed him. If he had been an instant earlier

he would have stepped immediately in front of the moving car.

It seems that a man with all his senses, walking a distance of two or three feet from a street car track, and parallel with it, when a car is approaching so closely behind that the instant he attempts to step upon the track, and does not see the car or hear it, and is struck by the car, he is clearly guilty of negligence. It is conceded in this case that the respondent attempted to step upon the railway track immediately as the approaching car came to him. The car was certainly making some noise. The respondent was walking leisurely along beside the track and there was nothing to distract his attention. No other car was within sight and no other conveyance was upon the street, and he must, therefore, have heard the car coming behind him. He must also have made a slight turn to the left in order to change his course so as to cross the track. A mere glance would have shown him that the car was upon him. Under these circumstances, the respondent, as a matter of law, was guilty of negligence which was the primary cause of his injury, and therefore should not be permitted to recover. I therefore dissent.

MACKINTOSH, J., concurs with MOUNT, J.

[No. 14936. Department Two. November 19, 1918.]

ADELINA GROSSO BADOLATO, *Respondent*, v. FRANK NICHOLAS BADOLATO, *Appellant*.[1]

DIVORCE (99)—CUSTODY AND SUPPORT OF CHILDREN—AGREEMENTS OF PARTIES—EFFECT. A separation agreement providing for the custody and support of children and that the parties should not interfere with each other is avoided where the husband thereafter interfered with the wife, making threats to kill her; and the court in granting a divorce is not bound by the separation agreement.

Appeal from a judgment of the superior court for King county, French, J., entered January 23, 1918, upon findings in favor of the plaintiff, in an action for divorce, tried to the court. Affirmed.

Vanderveer & Cummings and *H. McC. Billingsley*, for appellant.

HOLCOMB, J.—This is the second action brought by plaintiff for a divorce from the defendant. The first action was dismissed April 28, 1917, for failure of proof. Thereafter the parties entered into a separation contract, the material parts of which are, in substance, that their two children were to be placed in a home selected by three persons, and that the husband was to pay not to exceed $25 per month for board and care while thus maintained. Each party had the right to visit the children at proper times. It was further agreed that the parties would in nowise molest or in any way interfere one with the other.

Defendant denied the allegations of plaintiff's complaint and pleaded a cross-complaint. We have carefully read the testimony in this case and believe that it preponderates in favor of plaintiff. The separa-

[1]Reported in 176 Pac. 24.

tion contract is silent as to property rights of the parties and as to costs in the event of a divorce. The evidence shows that the defendant interfered with the plaintiff, making threats to kill her, subsequent to the dismissal of the first action. This would avoid the custody provision in the separation contract.

The trial court heard the evidence and was better able to judge as to the truth thereof than are we. The trial court awarded plaintiff a divorce, custody of the two small girls, with permission for reasonable visitation by defendant, who was decreed to pay to plaintiff for their support $25 monthly, commencing January 1, 1918. An equal division of the property was made, and an attorney's fee of $50 was granted plaintiff, with her costs. The defendant was obligated under the separation contract to pay $25 per month for the support of the children.

It is within the power of the court to grant the custody of children to one party or both, as will meet the best interest of the children. It has awarded them to the mother. In granting the decree the court was not bound by the separation agreement entered into by the parties when a change of conditions arose.

We find no error. Judgment affirmed.

MAIN, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 14937. Department Two. November 19, 1918.]

BANK OF CALIFORNIA NATIONAL ASSOCIATION, *Respondent*, v. MORTGAGE COMPANY, HOLLAND-AMERICA, *Appellant*.[1]

PRINCIPAL AND AGENT (69) — RIGHTS AS TO THIRD PARTIES — ACTIONS—BY AGENT. A bank paying money as agent under a mistake of fact and contrary to the strict directions of its principal, may sue to recover it back.

MONEY RECEIVED (6)—PERSONS LIABLE. Defendant is liable for money had and received where, by altering the receipt, he obtained possession from a bank messenger of money conditionally tendered, and refused to perform the conditions.

TENDER (7)—CONDITIONS. A conditional tender must be strictly followed or entirely refused.

Appeal from a judgment of the superior court for King county, Smith, J., entered March 4, 1918, upon findings in favor of the plaintiff, in an action for money had and received, tried to the court. Affirmed.

Ernest B. Herald, for appellant.

Kerr & McCord, for respondent.

HOLCOMB, J.—This cause of action originated out of a transaction between the appellant and McPherson Brothers Company. In 1915, McPherson Brothers Company negotiated with appellant for a building loan of $2,300, evidenced by three promissory notes, one for $1,300 and two for $500 each, dated November 5, 1915, and agreed that the first of the $500 notes was due November 1, 1916, and that the interest on all the notes was payable semi-annually on the first days of May and November, respectively. These notes were secured by a mortgage, and executed prior

[1]Reported in 175 Pac. 956.

to the payment of the money by appellant to a broker alleged to have been representing McPherson Brothers Company. This broker retained the difference between $2,300 and $2,146.41 as commission. McPherson Brothers Company contended that it was not chargeable with a brokerage commission, and assumed the position that it had received but $2,146.41 from appellant, while appellant contended that it had paid the entire $2,300 to McPherson Brothers Company, or on its account, and that therefore the true amount of indebtedness was $2,300 as evidenced by the notes. When the first installment of interest became due, McPherson Brothers Company remitted only a sufficient amount to cover interest at the agreed rate on the principal sum of $2,146.41. A great deal of correspondence regarding the dispute had been had between appellant and McPherson Brothers Company prior to November 1, 1916, the date of the second installment of interest and the maturity of the first of the $500 notes.

The foregoing events had transpired unknown to the respondent, and on or about November 1, 1916, it received by mail the following letters:

"First National Bank.
"Brewster, Washington, October 30th, 1916.
"Bank of California, N. A.
"Seattle, Wash.

"Gentlemen: Enclosed herewith please find our draft to your order in the sum of $585.75, together with a letter of instructions from one of our customers, Peter McPherson. Will you kindly look after the matter there for us. You may retain this letter if you wish, as we have a copy for our files.

"Thanking you for your services in this matter,
"Yours very truly,
"E. D. Clapp, Asst. Cashier."

"Brewster, Wash., Oct. 30, 1916.
"First National Bank of Brewster,
"Brewster, Washington.

"Gentlemen: Enclosed herewith we hand you our check for $585.75, which sum we will ask you to pay to Mortgage Co. Holland-America, 402 Hoge Bldg., Seattle, Wash., subject to the following conditions: $500 of which is to be applied on the principal on a loan made by that Co. to us for $2,146.41. The $85.75 is to pay the second installment of interest on said note due Nov. 1st, 1916. Said Mortgage Co. shall deliver to you two coupon interest notes, one due May 1st, 1916, which interest you paid for us on said last named date; also, one coupon interest note due Nov. 1st, 1916, for which you will pay them $85.75. If, however, said Mortgage Co. refuses to deliver to you the two coupon interest notes above mentioned, and endorse on the principal note the $500 payment you make them, on such refusal, you shall retain until further notice from us, the full amount represented by this check, subject to the demand of said Mortgage Co. on compliance with the conditions above mentioned to wit: the delivery to you for us the two coupon interest notes above mentioned, and proper acknowledgment of the payment of the $500 on said principal note. Yours truly,

"McPherson Bros. Co.
"By Peter McPherson."

Respondent prepared and addressed a letter to appellant, accompanied by a form of receipt to be signed and executed by appellant, which are as follows:

"The Bank of California, National Association.
"Seattle, Washington, November 1st, 1916.
"Mortgage Co. Holland-America,
"402 Hoge Building,
"Seattle, Washington.

"Dear Sirs: At the request of the First National Bank, Brewster, we enclose herewith our manager's check for $585.75, together with receipts in duplicate.

"Of this amount, $500 is to be applied on the prin-

cipal of the McPherson Bros. Co. loan for $2,146.41. The $85.75 is to be the second installment of interest of the said note, due November 1st, 1916.

"Please deliver to the bearer two coupon interest notes, one due May 1st, 1916, which interest was paid on that date, also interest coupon due November 1st.

"Please deliver the receipts to the bearer.

"Yours very truly,

"The Bank of California, N. A.

"L. T. Macklem, Manager."

"Seattle, Wash.

"Received of the Bank of California,

"National Association,

"Seattle, Washington.

"Five hundred eighty-five & 75-100s dollars as per mail order of First National Bank, Brewster, for account of McPherson Bros. Co., $500 applied on principal note $2,146.41, $85.75 payment interest due November 1st, 1916.

"Dated October 30, 1916.

"$585.75."

The foregoing letter, check and receipt were delivered to appellant by respondent's bank messenger. The appellant's representative took the receipt tendered by the respondent's messenger, changed the $2,146.41 to $2,300, and inserted after $85.75 the words "to apply on," and after payment inserted the word "of," so that the latter part of the receipt read $500, applied on principal note of *$2,300,* $85.75 *to apply on* payment *of* interest due November 1st, 1916. He retained the check and delivered the altered receipt and the $500 note due to the messenger, but neglected to deliver the interest coupons to the messenger as directed in respondent's letter. Upon the return of the messenger to the bank with the receipt in its altered form, respondent telephoned appellant and was informed by it that the matter had been adjusted with

McPherson Brothers Company, that appellant had correspondence to show that fact, and that therefore the alteration was all right. Respondent, relying on the representation, transmitted the receipt and note to the First National Bank of Brewster. On or about November 6, 1916, respondent received the return of the note and receipt as not satisfactory and not as tendered, and requested that they be returned to appellant and that $585.75, the amount paid as a conditional tender, be returned. The respondent took the matter up with appellant in an endeavor to have appellant return the money to respondent, offering in return to restore the note and altered receipt to appellant, without effect. Counsel for respondent also called on the appellant's representative with a view of getting matters amicably adjusted. On January 13, 1917, the First National Bank of Brewster demanded of respondent the return of the $585.75, unless the receipt be executed as outlined in the instructions sent with the draft on October 30, 1916.

The rights of appellant and McPherson Brothers Company are not at issue in this action. So far as the rights of appellant and respondent are concerned, the facts are that respondent tendered to appellant a conditional payment to be accepted upon the conditions or to be declined absolutely. Appellant demurred to the plaintiff's complaint upon the grounds that the respondent was not the proper party plaintiff and that it did not state facts sufficient to constitute a cause of action.

Where an agent pays money for his principal, under a mistake of fact and contrary to the directions of his principal, to a third person who has no right thereto and who wrongfully induces or contributes to the act of the agent, the agent may maintain an action

for its recovery. *Laing v. Nelson,* 41 Minn. 521, 43 N. W. 476; *Brown v. Shaw,* 51 Minn. 266, 53 N. W. 633; *Parks v. Fogleman,* 97 Minn. 157, 105 N. W. 560, 114 Am. St. 703, 4 L. R. A. (N. S.) 363.

It is clear that defendant obtained the money from the possession of plaintiff's messenger and retained it without right, by the alteration of the receipt. The alteration in the receipt and the appropriation of the money may have caused but a small amount of damage to the plaintiff's principal, but that does not matter. A conditional tender must be strictly followed if accepted, or entirely refused. Respondent, as agent, was, and is, liable to account to its principal for the whole sum intrusted to it. The whole sum intrusted to it belonged to appellant if it accepted the offer as made, and to the principal if not. The demurrer was properly overruled.

The other assignments of error are without merit. The judgment is affirmed.

MAIN, C. J., MOUNT, and PARKER, JJ., concur.

[No. 14941. Department Two. November 19, 1918.]

EVA F. RICHMOND, *Appellant*, v. ROLLAND H. DENNY *et al., as Executors, etc., Respondents.*[1]

APPEAL (272) — RECORD — STATEMENT OF FACTS — INCORPORATING AFFIDAVITS. Affidavits used upon a motion for a continuance not included in the statement of facts and made part of the record by the judge's certificate cannot be considered on appeal.

Appeal from a judgment of the superior court for King county, Smith, J., entered January 4, 1918, in favor of the defendants, dismissing an action to enforce a claim against the estate of a decedent. Affirmed.

Oscar G. Heaton (George F. Owens, of counsel), for appellant.

D. C. Conover (James P. Sweeney, of counsel), for respondents.

HOLCOMB, J.—This action was commenced June 7, 1917, against the defendants, who are the executors of the last will and testament of Orion O. Denny, who died in Seattle, February 26, 1916. Issues were joined and the cause set for trial January 3, 1918. On December 28, 1917, upon motion supported by affidavit, plaintiff asked for a continuance, and again on January 3, 1918, at the date of the trial, renewed her motion for continuance, supported by additional affidavits. These motions were both denied, whereupon, plaintiff being unable to proceed further, judgment of dismissal with costs was granted the defendants. From this judgment, plaintiff appeals.

The controlling question is whether the trial court abused its discretion in denying a continuance and

[1]Reported in 175 Pac. 957.

in denying the motion for a new trial. The affidavits and letters purporting to have been used at the hearing and in support of the motions for a continuance and for a new trial, not having been embodied in a statement of facts or a bill of exceptions and by the certificate of the trial judge made a part of the record, must be stricken. *Chevalier & Co. v. Wilson,* 30 Wash. 227, 70 Pac. 487; *Gray v. Granger,* 48 Wash. 442, 93 Pac. 912; *State v. Lee Wing Wah,* 53 Wash. 294, 101 Pac. 873; *Hayworth v. McDonald,* 67 Wash. 496, 121 Pac. 984; *Gazzam v. Zimmer,* 68 Wash. 41, 122 Pac. 366; *Powers v. Washington Portland Cement Co.,* 79 Wash. 1, 139 Pac. 615; *Thurman v. Kildall,* 80 Wash. 283, 141 Pac. 691; *Van Dyke v. Johnson,* 82 Wash. 377, 144 Pac. 540; *Lebovitz v. Cogswell,* 83 Wash. 174, 145 Pac. 212; *State v. Armstrong,* 87 Wash. 275, 151 Pac. 775; *Kuykendall v. Lambie,* 99 Wash. 366, 169 Pac. 853; *Lansdown v. Huff,* 103 Wash. 277, 174 Pac. 21; *Davidson v. King,* 103 Wash. 379, 174 Pac. 434; *Norris-Short Co. v. Everson Mercantile Co.,* 103 Wash. 399, 174 Pac. 645.

The record of this case being incomplete, the affidavits in support of the motions for a continuance and for a new trial being stricken, the appeal must be dismissed, and the judgment is affirmed.

Main, C. J., Fullerton, Mount, and Parker, JJ., concur.

[No. 14543. Department Two. November 20, 1918.]

N. E. NELSON, *Respondent*, v. INDUSTRIAL INSURANCE DEPARTMENT, *Appellant*.[1]

MASTER AND SERVANT (121-2)—INJURIES TO SERVANT—ACTIONS—REMEDIES UNDER WORKMEN'S COMPENSATION ACT — EVIDENCE — SUFFICIENCY. A finding of total partial disability in the loss of one eye as the result of an injury is sustained by evidence that the claimant's eyesight was good before the accident and began to fail shortly after, coupled with the opinion of reputable oculists that the condition may have resulted from the accident.

SAME (121-2)—COSTS—EXPERT WITNESS FEES. Costs and witness fees being purely statutory, the court has no discretion to allow extraordinary fees to expert witnesses under the workmen's compensation act, Rem. Code, § 6604-20, which authorizes the court to allow a reasonable attorney's fee and the "fees of medical and other witnesses," out of the administration fund.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered June 12, 1917, upon findings in favor of the plaintiff, allowing a claim for compensation, upon appeal from an order of the industrial insurance commission, tried to the court. Modified.

The Attorney General and *Howard Waterman, Assistant*, for appellant.

Henry Crass, for respondent.

CHADWICK, J.—This case comes to us on appeal from a judgment of the superior court overruling an order of the industrial insurance department denying respondent an allowance for a permanent partial disability.

Respondent was injured in an accident on a logging

[1]Reported in 176 Pac. 15.

railroad. He claims the loss of the sight of one eye. The court made findings as follows:

"That, prior to the accident, plaintiff's eyesight was good and he was not afflicted with optic atrophy.

"That, at the time of the injury, plaintiff complained of severe pain in his head over the left eye, which pains continued for some time, and to a certain degree up to the time of the trial.

"That shortly after the injury, the sight of the left eye began to fail and decrease rapidly, and at the time of the trial plaintiff was practically blind in the left eye.

"That, shortly before the accident, plaintiff could use one eye as well as the other, and there was no difference in the sight of either.

"That, as a result of the injury, plaintiff has sustained the practical total loss of vision in the left eye."

The physicians called in behalf of the department testify positively that the loss of the sight of respondent's eye could not have resulted from the injury received in the accident; that respondent is suffering from a primary optic atrophy; that primary atrophy is not due to inflammatory processes, nor is it the result of an injury; that, if there has been an atrophy of the optic nerve due to such causes, it is called secondary atrophy; that it is likely that respondent, being afflicted with true or primary optic atrophy, was not aware of his condition, which must have existed for some time before the accident, although not discovered until after he had been injured.

On the other hand, professional men testifying on behalf of respondent advance the opinion that there may have been some injury of the optic nerve; that it is almost impossible to make a positive diagnosis

in a case like this; that no one can say definitely whether an atrophy of the optic nerve is primary or secondary without considering the history of the case, and that there is no specific rule to positively determine what has caused the condition. One of the doctors suggests that learned discourse about primary and secondary atrophy is "dictionary definition, pure and simple," and that the term primary atrophy is often used for convenience to cover ignorance of the true causes. The doctors, as is sometimes the case, have disagreed. Their opinions cannot be reconciled. The testimony of the respondent is that he was a carpenter by trade; that, up to the time of the accident, he used either eye as convenience dictated, and that there had been no trouble with, or diminution of, his vision. A neighbor testified that, about a year before the accident, he was with respondent when he was shooting hogs, and that he could shoot from one shoulder as well as the other and that he never complained about his eyesight.

One of the first inquiries made by oculists in cases of atrophy of the optic nerve is whether the patient has ever been afflicted with lues, or any germ-carrying disease. There is no evidence that respondent was ever so afflicted. He denies that he was ever the victim of any such condition. These physical facts, coupled with the opinion of reputable oculists that the condition may have resulted from the accident, are enough to sustain the judgment of the court below.

The trial judge allowed a fee of $45 to one of the medical witnesses, who came from Portland, Oregon, to attend the trial. It is the contention of respondent that this allowance is proper under Rem. Code, § 6604-

20, which provides that the court may allow an attorney's fee,

"and the fees of medical and other witnesses and the costs shall be payable out of the administration fund, if the accident is affected by the litigation."

There is no provision of the law that will warrant the payment of extraordinary fees to expert witnesses as such. It was formerly provided, § 25 of the original act of 1911, Laws of 1911, p. 371, that,

"Upon appeal of any workman from any decision of the department affecting the extent of his injuries or the progress of the same, the court may appoint not to exceed three physicians to examine the physical condition of the appellant, who shall make report to the court thereon, and they may be interrogated before the court by or on behalf of the appellant in relation to the same. The fee of each shall be fixed by the court, but should not exceed ten dollars per day each."

This section was expressly repealed by § 10, ch. 188, Laws of 1915, p. 691, at which session of the legislature it was provided "that fees of medical and other witnesses and the costs shall be payable out of the administration fund."

We think it is hardly within any rule of statutory construction to say that it was the intention of the legislature to leave the fixing of witness fees to the discretion of the court.

"At common law costs were not recoverable *eo nomine* . . . costs can therefore be imposed and recovered only in cases where there is statutory authority therefor." 15 C. J. 21.

"It is the settled law of this state that 'costs are purely statutory, and can only be awarded when the statute gives them'." *Eggerth v. Spokane*, 91 Wash. 221, 157 Pac. 859.

Being dependent upon the statute, costs and witness fees are never to be allowed in the discretion of the trial judge, in the absence of a positive or permissive statute. *In re Queen's Estate,* 82 N. J. Eq. 588, 89 Atl. 860; *Struthers v. Christal,* 3 Daly's (N. Y.) 327; *Wallace v. Sheldon,* 56 Neb. 55, 76 N. W. 418.
So it is held that,

"Sums paid for compensation of expert witnesses, beyond ordinary fees authorized by statute for witnesses generally, are not taxable as costs." 15 C. J. 131; 5 Standard Ency. Proc. 951.

It will be observed that the only discretion given to the court in the allowance of costs on appeal from an order of the department is that the trial judge may fix a reasonable attorney's fee and "*such* [reasonable] fee, *and the fees* of medical and other witnesses . . . shall be payable etc.," plainly indicating that it was the intent of the legislature to associate medical witnesses with "other witnesses" and not with the attorney, whose service is independent of the witnesses and for which no fee is provided by law. We have heretofore refused to extend the terms of this statute by construction. *O'Brien v. Industrial Insurance Department,* 100 Wash. 674, 171 Pac. 1018.

It follows that the judgment of the lower court should be modified to this extent. In all other respects it is affirmed.

MAIN, C. J., HOLCOMB, MOUNT, and MACKINTOSH, JJ., concur.

[No. 14237. Department One. November 20, 1918.]

J. M. MOHNEY, *Appellant*, v. WALTER DAVIS *et al.*, *Respondents.*[1]

APPEAL (428) — HARMLESS ERROR — ERROR ON ISSUES FOUND IN FAVOR OF APPELLANT. An instruction on the subject of the limitation of actions does not work to the prejudice of the plaintiff upon causes of action upon which the jury found in favor of the plaintiff.

CORPORATIONS (81)—ACTIONS BETWEEN MEMBERS—LIMITATIONS—DISCOVERY OF FRAUD—DUTY OF OFFICERS. An officer of a corporation, suing fellow officers for fraud in misrepresenting the land values of the corporation, owes the duty of reasonable prudence in discovering the facts to start the running of the statute of limitations, and instructions to that effect need not invoke the rule that would be applicable in case plaintiff had been a stranger to the corporation or his fellow officers.

APPEAL (460)—HARMLESS ERROR—INSTRUCTIONS—PREJUDICIAL EFFECT. In an action by an officer of a corporation against fellow officers for fraud, it is not prejudicial error to instruct that a corporate officer is charged with notice of all facts shown by the records of the corporation where the facts on which recovery was sought were not shown by the records and the subject was foreign to the jury's inquiry.

FRAUD (11-1)—ACTIONS—DEFENSES. In an action by an officer of a corporation against fellow officers for fraud in the sale of stock, there can be no recovery where there was no evidence that the defendants made or authorized any of the representations inducing the purchase, all of which were made by a third person.

SAME (11-1). In an action for fraud in the sale of stock by misrepresenting the value of certain corporate lands, plaintiff cannot complain that the corporation obtained no title because the purchase was in fraud of the government, where the government had taken no steps to challenge or set aside the title.

APPEAL (460)—HARMLESS ERROR—INSTRUCTIONS—PREJUDICIAL EFFECT. Error in failing to instruct upon the measure of damages is not prejudicial to plaintiff where he did not complain of the amount of damages awarded him.

APPEAL (352)—ASSIGNMENT OF ERRORS—FAILURE TO ASSIGN IN BRIEF. In the absence of any assignment of error or argument in

[1]Reported in 176 Pac. 31.

the brief, there can be no reversal upon a cross-appeal by defendants, although they appealed and filed supersedeas bonds staying execution.

Cross-appeals from a judgment of the superior court for Spokane county, Blake, J., entered June 30, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages. Affirmed.

Voorhees & Canfield and *C. E. H. Maloy,* for appellant.

Hanna & Hanna and *Wakefield & Witherspoon,* for respondents.

PARKER, J.—This action was brought by the plaintiff, Mohney, against the defendants, Davis and Beck, in the superior court for Spokane county, seeking recovery of damages upon eleven causes of action, ten of which were assigned to him. Trial upon the merits in that court sitting with a jury resulted in verdict and judgment awarding the plaintiff recovery upon seven of the assigned causes of action and denying him recovery upon the other four causes of action, one of the latter being taken from the jury, the court deciding, as a matter of law, that the plaintiff could not recover thereon. The plaintiff appealed from the judgment in so far as it denies him recovery upon the four causes of action. The defendants thereafter appealed from the judgment in so far as it awards Mohney recovery against them upon the seven causes of action.

The claim of damages made by Mohney and his assignors rests upon the alleged false and fraudulent representations made by Davis, Beck and others, acting in concert with a common design, as to the quality and value of lands owned by the Skeena Valley Land

Company, inducing Mohney and his assignors to purchase shares of the capital stock of that company.

In the fall of 1909, one Callahan approached Davis and Beck with a view to inducing them to become interested with him in the organization of a corporation to purchase and sell lands situated in the Cassiar land district, in British Columbia. Callahan was apparently acquainted with the lands which it was contemplated should be acquired by the corporation. Davis and Beck were both residents of this state and knew nothing of the quality or value of the lands or of the agricultural possibilities of the district in which they were situated. After arriving at an understanding with Callahan, one Crane, and some others, touching the acquisition of the lands, the capitalization of the company and the number of shares of capital stock to be left in the treasury of the company to be offered for sale to the public, articles of incorporation were prepared and signed by Callahan, Crane, Davis, Beck and two others, which were duly filed in the proper offices of this state, resulting in the due incorporation of the Skeena Valley Land Company in May, 1910. In June, 1910, the first payments were made upon the lands to the proper officers of the British Columbia government, and sometime thereafter title thereto was perfected to the satisfaction of that government, through which title the land company acquired its title to the lands. Callahan, Crane, Davis, Beck and two others were the original trustees named in the articles of incorporation; Mohney, Clemmer and Dr. Balsiger, two of Mohney's assignors, having become interested in the company by the purchase of treasury stock, were, at a meeting on July 30, 1910, duly elected trustees of the corporation, and thereafter, it seems to us, exercised as much as, or even more, active control over the

affairs of the company than did either Davis or Beck. In June, 1910, Crane was authorized by the trustees to go to British Columbia, examine the lands and report upon their quality and value, with a view to checking the information on that subject acquired from the talk with Callahan. Crane reported to the meeting of July 30, 1910. This report was favorable as to the quality and value of the lands, which, with the talk of Callahan, furnished Mohney, Clemmer and Dr. Balsiger all the information which Davis or Beck ever had on that subject until long after the purchase of stock by Mohney and his assignors. Most of the stock purchased by these three was purchased after this meeting. Clemmer, however, had purchased some stock before then, but he did so upon information of the same kind and from the same source as Davis and Beck had acted upon, to wit, the representations of Callahan. Long after the stock purchase by Mohney and his assignors, the lands were discovered to be of little value. While Davis and Beck were, in law, officers of the company, they were practically only nominally so in so far as the active management of its affairs were concerned, Callahan having the active management, especially in so far as the sale of the treasury stock was concerned. This was accorded him by Mohney, Clemmer and Dr. Balsiger, as well as by Davis and Beck. This action was commenced in March, 1915, more than four years after Mohney, Clemmer and Dr. Balsiger had purchased their stock, become officers of the corporation, and possessed all the knowledge as to the value of its lands which was possessed by either Davis or Beck.

The verdict and judgment, in so far as it awarded recovery to Mohney upon the seven assigned causes of action, was evidently rested upon the theory that

Davis and Beck, being officers of the corporation, were liable to those assignors as strangers to the corporation, and hence, in law, liable for the misrepresentations made by Callahan as to the value of the lands, inducing those assignors to purchase the treasury stock. The verdict and judgment, in so far as it denied to Mohney recovery upon his own cause of action and those of Clemmer and Dr. Balsiger assigned to him, was evidently rested upon the theory that those causes of action were barred by the three-year statute of limitations; or upon the ground that there were no false representations made by Davis or Beck to Mohney, Clemmer or Dr. Balsiger, and that they, at the time they purchased their stock, were possessed of all the information, and from the same source, as to the value of the company's lands as were Davis and Beck. The judgment, in so far as it denied to Mohney recovery upon the remaining cause of action which was assigned to him by Henry Balsiger, a cousin of Dr. Balsiger, was evidently rested upon the theory that there was no evidence of any representations, for which Davis or Beck were responsible, inducing Henry Balsiger to purchase his stock.

It is contended in appellant Mohney's behalf that the trial court erred in giving to the jury its instruction No. 4 as follows:

"(a) Having laid before you the character of the action and the claims of the parties as set up in their pleadings, I will now state to you the law that is to govern you in your consideration of the evidence. At the threshold of the case we are met by a statute of the state of Washington which provides that actions for fraud shall be commenced within three years after the party claiming the fraud discovers the facts constituting the fraud. In this connection I instruct you that if the plaintiff, or any of his assignors, knew of the facts which they now claim to be fraudulent (*or if*

the plaintiff or any of his assignors were in a position where, by the exercise of reasonable prudence, they could or would have discovered such facts, or if they were cognizant of such facts that would arouse the suspicion of a reasonably prudent man, and put him on inquiry to ascertain the truth or falsity of such facts) more than three years prior to the 9th day of March, 1915 (the day on which this action was commenced), then the action of the plaintiff or the cause of action upon the assignment of such an assignor is barred by the statute and no recovery can be had on such cause of action. *And in this connection you may take into consideration the official connection, as director or other officer of the corporation, of the plaintiff or assignor in determining at what time he came into such knowledge of the facts, or came into a position where it was incumbent upon him to make inquiry or investigation.* (b) *And I further instruct you that a director or officer of the corporation is chargeable with knowledge of all facts which the records of the corporation disclose.*"

We have italicized, as counsel have done, the portions of this instruction of which they complain as being "particularly objectionable." We have also designated the two portions thereof by letters (a) and (b), since we think they require separate treatment by us. We are to remember that the only question of error here to be considered is as to whether or not this instruction was erroneous and worked to the prejudice of the rights of Mohney as to his own cause of action and as to those of Clemmer and Dr. Balsiger assigned to him. Manifestly this instruction did not work to the prejudice of Mohney's rights to recover upon the seven causes of action assigned to him by strangers to the corporation upon which he was awarded recovery by the verdict and judgment, since the verdict and judgment determined, in effect, that those causes of action were not barred. We are also

to remember that Mohney, Clemmer and Dr. Balsiger were, as early as July, 1910, more than four years prior to the commencement of this action, trustees of the corporation, and at least as actively engaged in the management of its affairs as were Davis and Beck, and also that they had, at that time, as much knowledge of the quality and value of the lands as had Davis and Beck, which knowledge came to them from the same source as that from which Davis and Beck received their knowledge upon that subject.

It is argued that the instruction ignores the rule, as claimed by counsel, that, in such cases as this, in order to start the statute of limitations running against the injured party, he must have such knowledge as will put him upon inquiry as to the wrong which he claims worked to his injury. Reading the portion (a) of the instruction as a whole, we think it does not ignore to Mohney's prejudice the rule invoked by counsel, in so far as we are concerned with his own cause of action and those of Clemmer and Dr. Balsiger. In the first italicized portion of the instruction, the jury are told that, "if the plaintiff or any of his assignors (this for present purposes means only Mohney, Clemmer and Balsiger) were in a position where, by the exercise of reasonable prudence, they could or would have discovered such facts," then such cause or causes would be barred. As to these causes of action, the question was not merely of Mohney, Clemmer and Dr. Balsiger having knowledge of facts suggesting inquiry on their part as to the quality and worth of the lands, but it was a question of their knowledge and duty in that respect as officers of the corporation with Davis and Beck. It is not a question of their rights as strangers to the corporation against Davis and Beck. The peculiar position in which we find Mohney, Clemmer and

Dr. Balsiger, we think, calls for their exercising reasonable prudence and care in their official positions at that time looking to the learning of the quality and value of the company's lands, in so far as their rights against Davis and Beck are concerned. If they had been strangers to the corporation and to Davis and Beck, instead of being trustees and fellow officers with Davis and Beck, there might be some reason for the narrower application of the rule invoked by counsel for Mohney. We think the portion (a) of the instruction, read as a whole, was as favorable to Mohney, touching his own cause of action and those of Clemmer and Dr. Balsiger assigned to him, as he was entitled to under the facts of the case. Indeed, it might well be argued that the facts of the case did not call for any instruction of this nature.

Contention is made in Mohney's behalf that the portion (b) of the instruction was erroneous. There may be circumstances under which an officer of a corporation would not be chargeable with knowledge of all facts disclosed by the records of the corporation, but this portion of the instruction was clearly without prejudice in this case, because the facts upon which recovery was sought were not facts disclosed by the records of the corporation. This portion of the instruction was so clearly foreign to any question the jury was called upon to decide that we think it must be concluded that the jury were not thereby in the least prejudiced against Mohney, Clemmer or Dr. Balsiger.

Contention is made that the trial court erred in taking from the jury the cause of action assigned by Henry Balsiger to Mohney and deciding, as a matter of law, that no recovery could be had thereon; and in this connection it is contended that the trial court

erred in excluding the deposition of Henry Balsiger taken in Colorado. This purchase of stock was made by Henry Balsiger through Dr. Balsiger, his cousin. We think there was no evidence that Davis or Beck made or authorized any of the representations which induced this purchase by Henry Balsiger, but that the acts and words of Dr. Balsiger, his cousin, induced the purchase; and this we think must be the conclusion to be reached, even though the excluded deposition be considered in evidence, which deposition we find among the exhibits and have read. We think the court did not err in deciding, as a matter of law, that there could be no recovery upon this cause of action, nor was there prejudicial error in excluding the deposition, since the result must have been the same had the deposition been read in evidence at the trial.

Some contention is made that the lands were acquired from the government of British Columbia in fraud of its rights, and that therefore the land company never acquired any title to the lands. A sufficient answer to this contention seems to be found in the fact that title was acquired to the several tracts of land from the government of British Columbia by proceedings and payment of purchase price to its satisfaction, and that it is not in any manner challenging such title or seeking the setting aside of it upon the ground of fraud. This contention is made as affecting the measure of damages, it being claimed that had the trial court not, in effect, assumed, in the presence of the jury, that the corporation acquired good title, but left that question for determination by the jury, it might have awarded a larger amount of damages upon the theory that the company had no title to any land, rather than upon the theory that it had title to land of some value. But this view at once shows that the assumption of the court was, in any event, without

prejudice to Mohney, because he is not appealing from the award of recovery made to him by the judgment rendered upon the seven causes of action, and hence there is no question of error here touching the measure of damages as to those causes of action; and, since the jury declined to award him any recovery upon his own cause of action and those of Clemmer and Dr. Balsiger, manifestly there is no question here of the measure of damages as to those causes of action.

Some other claims of error are made in behalf of Mohney, but we think they are without merit as affecting his rights touching the four causes of action as to which he was denied recovery. We conclude that the judgment must be affirmed in so far as it denies to Mohney recovery upon the four causes of action.

While Davis and Beck have appealed from the judgment in so far as it awards recovery to Mohney against them upon the seven causes of action, and supersedeas bonds have been executed and filed in their behalf staying the execution of judgment against them, there is no assignment of error or argument made here in support of their appeals. This condition of the record also calls for an affirmance of the judgment in so far as it awards to Mohney recovery against Davis and Beck upon the seven causes of action.

We note that both Davis and Beck have died pending these appeals. Some questions arose because of their deaths, which were, in a measure, disposed of by our decision rendered May 7, last, *Mohney v. Davis*, 102 Wash. 158, 172 Pac. 919. Our disposition of Mohney's appeal upon the merits renders it unnecessary to here notice those questions.

The judgment is in all things affirmed. Neither party shall recover costs in this court.

FULLERTON, TOLMAN, and MITCHELL, JJ., concur.

[No. 14640. Department Two. November 20, 1918.]

LENA NELSON *et al., Respondents,* v. THE CITY OF SPOKANE, *Appellant.*[1]

MUNICIPAL CORPORATIONS (405-407)—TORTS—GOVERNMENTAL FUNCTIONS—PARK—CONSTRUCTION OF DAM. The improvement of a city park not for profit being the exercise of a governmental function, the city is not liable for the negligent construction of a dam backing up the water of a stream to the damage of an upper riparian proprietor.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered August 6, 1917, upon the verdict of a jury rendered in favor of the plaintiffs, in an action in tort. Reversed.

J. M. Geraghty and *Alex M. Winston,* for appellant.

Tustin & Chandler, for respondents.

MAIN, C. J.—The city of Spokane, being the owner of a public park which was not operated for profit, erected a dam within the park across a running stream of water. This dam was negligently constructed by the board of park commissioners in such a manner that it obstructs the stream to the damage of respondents' property, which is situated about one-half mile up the stream from the park. The appellant city claims that no liability exists against it for the reason that, in the construction of the dam, it was acting in a governmental capacity.

This court has held that the liability of a city for acts such as the one here complained of depends upon whether the negligence was in respect to governmental or proprietary functions. We are committed to the doctrine that, in respect to governmental functions, cities are not liable for those negligent acts. *Lawson*

[1]Reported in 176 Pac. 149.

v. Seattle, 6 Wash. 184, 33 Pac. 347; *Simpson v. Whatcom,* 33 Wash. 392, 74 Pac. 577, 99 Am. St. 951, 63 L. R. A. 815; *Lynch v. North Yakima,* 37 Wash. 657, 80 Pac. 79, 12 L. R. A. (N. S.) 261.

There remains then only to determine whether a city, in the operation of a park not for profit, is performing a governmental or proprietary function. Here, again, we are committed by the decisions of this court to the doctrine that the operation or improvement of a park not for profit is the exercise of a governmental function. *Russell v. Tacoma,* 8 Wash. 156, 35 Pac. 605, 40 Am. St. 895; *Clark v. Seattle,* 102 Wash. 228, 172 Pac. 1155.

These cases would seem to be determinative of the issue presented here and exempt the appellant from liability. There is nothing in conflict with this holding in those cases in which we have maintained the right of a riparian owner to have the water of the stream flow by in its natural course and in which we have held the city liable for the obstruction thereof. It will be found that those cases were ones in which the city's negligence occurred while in the exercise of its proprietary functions. *Ronkosky v. Tacoma,* 71 Wash. 148, 128 Pac. 2; *Powelson v. Seattle,* 87 Wash. 617, 152 Pac. 329; *Willett v. Seattle,* 96 Wash. 632, 165 Pac. 876.

The case of *Jorguson v. Seattle,* 80 Wash. 126, 141 Pac. 334, cited by the respondent, does not hold that the city is liable when acting in either a proprietary or governmental capacity, but holds that the city, being otherwise liable, has no right to take or damage property without compensation. It would serve no useful purpose to enter into a discussion of the reasons for the different rules of liability of municipalities when acting in different capacities. It suffices to say that the rule in these cases is as indicated and we

adhere to it in this decision. The judgment is reversed and the action dismissed.

MOUNT, HOLCOMB, CHADWICK, and MACKINTOSH, JJ., concur.

[No. 14704. Department Two. November 20, 1918.]

THE STATE OF WASHINGTON, *Appellant*, v. ISAAC BELKNAP, *Respondent*.[1]

FISH (5)—STATUTORY PROVISIONS—POSSESSION DURING CLOSED SEASON. Laws of 1917, p. 799, § 16, making it unlawful to possess or deal in salmon during the closed season cannot be sustained as a valid exercise of the police power for the protection of salmon, in view of the proviso to the act providing that the act shall not apply to salmon taken beyond the three-mile limit outside the straits of Juan de Fuca; since the proviso defeats the purpose which is the one justification of such legislation.

Appeal from a judgment of the superior court for Pacific county, Hewen, J., entered September 14, 1917, upon sustaining a demurrer to the information, dismissing a prosecution for violation of the fishing laws. Affirmed.

L. L. Thompson, Attorney General, W. V. Tanner, and *John I. O'Phelan,* for appellant.

Welsh & Welsh, for respondent.

MACKINTOSH, J.—By information, the defendant was charged with having in his possession for the purpose of sale, on the 27th day of August, 1917, salmon fish which he had caught beyond the three-mile limit outside of the Columbia river. This prosecution was instituted under § 65, chapter 31 of the Laws of 1915, p. 67, as amended in § 16, chapter 169 of the Laws of 1917, p. 799, which section reads as follows:

"It shall be unlawful for any person, firm or corporation to purchase, handle, deal in or have in his

[1]Reported in 176 Pac. 5.

possession except for the sole use of himself and family any food fish of any variety which were taken from the waters of this state during any of the closed seasons prescribed in this act, and any person who purchases, handles, deals in or has in his possession any such fish during such periods, except for the sole use of himself and family, shall be guilty of a misdemeanor. And it shall be unlawful for any person, firm or corporation to purchase, handle, deal in, or have in his possession, except for the sole use of himself and family any salmon fish of any variety which were taken beyond the three mile limit outside of the Columbia river, during any of the closed seasons prescribed in this act; *Provided, however,* that this provision shall not apply to salmon taken beyond the three mile limit outside the Straits of Juan de Fuca."

A demurrer, which was sustained, was interposed to the information; the grounds of the demurrer being that the section quoted is unconstitutional, in that it was an unlawful interference with interstate and foreign commerce and deprived the defendant of his property without due process of law, by prohibiting the dealing in salmon fish during the closed season, although the defendant had come into lawful possession of such fish outside of the jurisdiction of this state.

Upon the question presented here, there is a sharp and radical difference in the decisions of the various courts which have considered it. There are two distinct lines of authority, one represented by some decisions of the state courts and of the Federal courts in different districts of the United States, the other line of authority represented by the decisions of the courts of England, a few of the state courts and Federal courts of different districts, and by the decisions of the supreme court of the United States. The first line of authorities holds that the legislature of the

state has no power to punish one for the possession of fish or game which was lawfully captured or killed; that it, having become his lawful private property, cannot be confiscated nor can he be punished for having it in his possession for any purpose, any more than any other lawful property can be confiscated or subject the owner to punishment by reason of its possession; that, when the possession was taken, it being lawful, that possession cannot thereafter become unlawful by lapse of time. The other line of authorities sustains acts such as the one under examination, upon the theory that they are proper exercises of the police power of the state, passed for the purpose of aiding in the protection of the fish and game of the state. This doctrine is most clearly stated in, and supported by, the decision of the United States supreme court in the case of *Silz v. Hesterberg,* 211 U. S. 31. It is unnecessary to review the conflicting decisions of different jurisdictions, but it is sufficient to say that we are impressed with, and in a proper case would be inclined to follow, the decision just referred to. In that case the supreme court held that the act, which was similar to the section before us, exclusive of the proviso, was not void within the meaning of the 14th amendment because it did not deprive the possessor of property without due process of law; "the acts in question were passed in the exercise of the police power of the state with a clear view to protect the game supply for the use of the inhabitants of the state." The court then passed to the consideration of the question of whether the act in question was an unreasonable and arbitrary exercise of that power and said, at page 40:

"It is contended, in this connection, that the protection of the game of the state does not require that

a penalty be imposed for the possession out of season of imported game of the kind held by relator. It is insisted that a method of inspection can be established which will distinguish the imported game from that of the domestic variety, and prevent confusion in its handling and selling. That such game can be distinguished from domestic game has been disclosed in the record in this case, and it may be that such inspection laws would be all that would be required for the protection of domestic game. But, subject to constitutional limitations, the legislature of the state is authorized to pass measures for the protection of the people of the state in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted. In order to protect local game during the closed season it has been found expedient to make possession of all such game during that time, whether taken within or without the state, a misdemeanor. . . . It has been provided that the possession of certain kinds of game during the closed season shall be prohibited, owing to the possibility that dealers in game may sell birds of the domestic kind under the claim that they were taken in another state or county. The object of such laws is not to affect the legality of the taking of game in other states, but to protect the local game in the interest of the food supply of the people of the state. We cannot say that such purpose, frequently recognized and acted upon, is an abuse of the police power of the state, and as such to be declared void because contrary to the Fourteenth Amendment of the Constitution."

On the question of whether the act was an unlawful attempt to regulate foreign or interstate commerce, the court held:

"That a state may not pass laws directly regulating foreign or interstate commerce has frequently been held in the decisions of this court. But while this is true, it has also been held in repeated instances that laws passed by the states in the exertion of their police power, not in conflict with laws of Congress

upon the same subject, and indirectly or remotely affecting interstate commerce, are nevertheless valid laws."

The foundation for the decision of this case is the same as that which underlies all the decisions which support the constitutionality of these acts; and that is, that, in order to protect local game and fish during the closed season, it is *expedient* to make it unlawful to possess such game or fish during such times, although such game or fish were originally lawfully taken, either within or without the state, "owing to the likelihood of fraud or deceit in the handling of such game;" and that this *expediency* extends to denying the right to possess game or fish from without the borders of the state, though it may be readily distinguished from the game or fish of the state which is sought to be protected, for the reason that the officials executing the law are to be relieved of the necessity of making even the casual inspection necessary to identify the game or fish held for sale.

But an examination of the section of our act discloses that the legislature has in the section itself nullified the reason which these courts have assigned as the only basis for sustaining the legislation attempted in the main part of this section; for the legislature has added a proviso which reads: "that this provision shall not apply to salmon taken three miles outside of the straits of Juan de Fuca." By adding this provision, the act renders it possible to defeat the very purpose which the United States supreme court in the *Silz* case has declared to be the one justification of such legislation, namely, to protect the local game and fish. To prevent the possibility of salmon fish being caught unlawfully within this state and, when offered on the market, for their possessor to

claim that they were lawfully in his possession because taken without the three-mile limit outside of the Columbia river, the courts have sustained the exercise of the police power attempted in the main portion of the section; but the proviso makes it possible for this very fraud to be perpetrated by allowing the possessor of fish unlawfully taken within the state to offer them on the market under the claim that they were lawfully in his possession because taken beyond the three-mile limit outside the Straits of Juan de Fuca. If the main portion of this section could be sustained, it could only be so as tending to aid in the protection of fish and game in this state; the proviso defeats that end.

Cessante ratione legis cessat et ipsa lex.

The judgment is affirmed and the case dismissed.

MAIN, C. J., MOUNT, HOLCOMB, and CHADWICK, JJ., concur.

ON REHEARING.

[*En Banc.* July 7, 1919.]

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court still adhere to the decision filed herein, and for reasons therein stated, the judgment is affirmed.

[No. 14737. *En Banc.* November 20, 1918.]

R. A. HAHN, *Appellant*, v. SOPHRANA HAHN, *Respondent*.[1]

MARRIAGE (17)—ANNULMENT — GROUNDS — INVALID MARRIAGE. A void marriage contracted in another state in violation of a decree of divorce and of Rem. Code, § 991, prohibiting remarriage for a period of six months, should be annulled in accordance with the public policy of the state, no matter how undeserving the parties may be.

Appeal from a judgment of the superior court for Spokane county, Hurn, J., entered November 17, 1917, upon findings in favor of the defendant, dismissing an action to annul a marriage, tried to the court. Reversed.

Robert Corkery, for appellant.

John B. White, Fred J. Cunningham, and *Ralph Robinson*, for respondent.

TOLMAN, J.—The appellant instituted this action for the purpose of procuring a decree annulling a marriage which he entered into with the defendant at Coeur d'Alene, Idaho, on July 4, 1913. The defendant defaulted, and the prosecuting attorney of Spokane county appeared at the trial and defended on behalf of the state.

From the evidence it appears that the defendant was divorced from her former husband in the superior court for Spokane county by decree entered on May 22, 1913. And the marriage, therefore, took place within six months of the entry of the prior decree, in defiance of its terms and of the statute. Rem. Code, § 991.

Both parties were residents of Washington at the time of the marriage, and for a long time prior thereto.

[1]Reported in 176 Pac. 3.

Neither had any intention of becoming residents of Idaho, having gone to Coeur d'Alene, procured a license, gone through the marriage ceremony, and returned to this state all on the same day, and making their home in Spokane, which home had been prepared previous to the marriage, from that time on so long as they resided together.

The appellant admits that he knew, at the time of the marriage, that no legal ceremony could be performed in Washington because of the defendant's too recent divorce; that he thought she might be liable to some penalty because of the Idaho marriage, but claims that he did not know that such a marriage was illegal until some six or seven months thereafter, and that, when he so learned, he asked the defendant to marry him again, which she declined to do; notwithstanding which the parties continued to live together as husband and wife until the fall of 1916, when difficulties arose between them and they separated. The defendant not having appeared or testified, we, of course, know nothing of what her version of the facts might be.

The trial court found that appellant knowingly violated the law, that he was estopped to allege or prove that the Idaho marriage was illegal, denied him any relief, and dismissed his action with prejudice, and he appeals.

Let it be said in the beginning that the appellant's actions, as detailed by himself on the witness stand, were most reprehensible and cannot be too severely condemned. But the law provides other means for punishing him, which should have been resorted to. We have so often held that the statute prohibiting and declaring void all marriages contracted within six months after either party has been divorced, "whether

contracted within or without this state," means what it says and is the law of this state that further discussion or citation of previous decisions is wholly unnecessary. The effect of the judgment below is to recognize a wholly illegal and void marriage as subsisting, and the state is thereby put in a false position with respect thereto. However undeserving the parties may be, the court should, in such a case, immediately, and at the first opportunity, recognize the public policy of the state, as declared by the statute, and enter its decree annulling such a marriage, to the end that the public be protected so far as possible from the evils which follow such unlawful unions, and to prevent the innocent from suffering therefrom. This seems to be the undoubted policy of the state, as our statute (Rem. Code, § 983), without reference to the guilt or innocence of either party, provides:

"When there is any doubt as to the facts rendering a marriage void, either party may apply for, and on proof obtain, a decree of nullity of marriage."

The judgment of dismissal is reversed, with directions to enter a decree annulling the marriage.

ALL CONCUR.

[No. 14824. Department Two. November 20, 1918.]

ELLENSBURG CREAMERY & PRODUCE COMPANY, *Appellant*, v. TOPPENISH CREAMERY COMPANY *et al.*, *Defendants*, D. J. DAVIS *et al.*, *Garnishee Defendants and Respondents.*[1]

APPEAL (287)—STATEMENT OF FACTS—TIME FOR FILING. A statement of facts, filed seventy-two days after entry of the judgment, without obtaining an extension of time, is not in time, and will be struck out.

Appeal from a judgment of the superior court for Yakima county, Taylor, J., entered January 16, 1918, upon findings in favor of the garnishee defendants, dismissing garnishment proceedings, tried to the court. Affirmed.

Charles F. Bolin, for appellant.

Lee C. Delle, for respondents.

MACKINTOSH, J.—The judgment appealed from was entered on the 6th day of October, 1917. No motion for a new trial was made, and on the 18th day of December, 1917, the statement of facts was filed, this being seventy-two days after the entry of judgment, and no order of the court or stipulation of the parties appears to have been obtained granting an extension of the time of filing the statement of facts. For this reason, the motion of the respondent that the statement of facts be stricken must be granted. In the absence of the statement of facts, there is nothing before us for review, and the judgment of the lower court is affirmed.

MAIN, C. J., HOLCOMB, CHADWICK, and MOUNT, JJ., concur.

[1]Reported in 176 Pac. 1.

[No. 14839. *En Banc.* November 20, 1918.]

ELIZABETH E. MITCHELL *et al., Respondents,* v. E. J. HUGHES *et al., Appellants.*[1]

ARREST (6)—AUTHORITY TO ARREST WITHOUT WARRANT. An officer may not on information or suspicion make an arrest for a misdemeanor without a warrant, unless the misdemeanor was actually committed in his presence.

SHERIFFS AND CONSTABLES—CIVIL LIABILITY FOR NEGLIGENCE—ATTEMPT TO ARREST WITHOUT WARRANT. It is unlawful for officers to combine to stop travelers on the highway in an attempt to find and arrest without warrant some person transporting liquors in violation of the prohibition law.

DAMAGES (9—11) — GROUNDS — PROXIMATE OR REMOTE CONSEQUENCES—SHOOTING IN CONSPIRACY FOR UNLAWFUL ARREST. Where an innocent traveler on the highway was shot by one of a party of officers who had unlawfully combined to stop travelers in an attempt to find and arrest without warrant some person violating the prohibition law, the unlawful combination was the proximate cause of the injury, whether the shooting was wanton or not; and it is immaterial that the shooting was not agreed upon by the conspirators in advance.

CONSPIRACY—CIVIL LIABILITY—JOINT TORT FEASORS. Where two or more persons enter into an unlawful conspiracy each is responsible for any act done by either in furtherance of the common design, and it is immaterial that the act was the result of a sudden impulse, when it followed in natural sequence in continuous succession of the events.

FALSE IMPRISONMENT (4)—CIVIL LIABILITY—DEFENSES. It is no defense to an action for unlawful conspiracy by officers to stop travelers on the highway to make arrest for misdemeanor without warrant, that plaintiffs exceeded the speed limit in attempting to escape from supposed highwaymen.

INTOXICATING LIQUORS (29, 30) — REGULATION — TRANSPORTATION AND POSSESSION. The possession of less than a pint of whiskey in an automobile is not necessarily unlawful, especially when knowledge of its presence is not shown.

FALSE IMPRISONMENT (4)—ARREST WITHOUT WARRANT—CIVIL LIABILITY—DEFENSES. Neither the good intentions of an officer nor the

[1]Reported in 176 Pac. 26.

advice of his attorney is a defense to a civil action for damages for making an unwarranted arrest for misdemeanor without warrant.

FULLERTON, J., dissents.

Appeal from a judgment of the superior court for King county, French, J., entered January 14, 1918, upon findings in favor of the plaintiffs, in an action in tort, tried to the court. Affirmed.

Daniel Gaby and *Bradford & Egan*, for appellants.

Charles S. Gleason and *E. P. Dole*, for respondents.

TOLMAN, J.—This action was brought by respondents, who are husband and wife, to recover for personal injuries received by the respondent wife on or about the 3d day of December, 1916.

The facts admitted or fairly established by the evidence are substantially as follows: The respondent wife was employed in Seattle, her husband being employed near Renton, and their child living with its grandmother in Maple Valley, all in King county, Washington. On the date mentioned, Charles McCoy, who was a friend of the family and who lived in Maple Valley, informed the respondent Elizabeth E. Mitchell that he intended to drive that night in his automobile from Renton to Maple Valley, and offered to take her to Maple Valley to see her baby, which invitation she accepted. They left the home of McCoy's parents in Renton about midnight and started to drive to Maple Valley, some ten or twelve miles distant.

At the time, the appellant E. J. Hughes was mayor of Renton and a deputy sheriff of King county; the appellant John Stewart was night watchman of Renton; and the appellant John Flynn was a private citizen, but had formerly been an officer of Renton.

It had been reported on that day to the appellant Hughes that an automobile load of intoxicating liquors

being transported from Kent to Issaquah would pass through Renton that night between eleven and two o'clock, and under directions from Hughes, Stewart, Flynn and the other defendants in the case below, who have not appealed, assembled on a public bridge over Cedar river, in Renton, for the purpose of stopping and searching any automobile suspected of containing intoxicating liquor, and if such liquor should be found, of taking the persons then in possession of it into custody and having them prosecuted.

Before assembling on the bridge for the purposes stated, the appellant Hughes asked the advice of a lawyer, who had been for six terms city attorney of Renton and a member of the legislature, and was advised by him to the effect that, if an automobile or automobiles stopped at the request of the officers, they, the officers, might search it, and if they found liquor in unlawful quantities, they might take into custody the persons having the possession of it; but upon no account to use any force or violence.

The appellant Hughes stationed himself a short distance from the bridge in order to watch automobiles going toward the bridge, and to give a signal by whistle to the officers on the bridge to stop any such automobile which he might suspect of containing intoxicating liquor. None of the persons so acting were armed with any warrant against any person whomsoever.

As the automobile in which McCoy and respondent Elizabeth E. Mitchell were riding approached the bridge, the appellant Hughes gave to the officers on the bridge the appointed signal to stop them, and two of the officers started toward the automobile, displaying a flashlight, and one or both of them shouted an order to stop. They were not in uniform, and did

not display any badge nor announce that they were officers of the law, or what their purpose was. Mrs. Mitchell had never known any of them, and Mr. McCoy, while he had known most of them, testifies that he did not recognize them in the darkness. Both McCoy and Mrs. Mitchell testified that they believed it was a holdup.

When the first two officers stepped toward the automobile and gave the order to stop, the driver, McCoy, instead of stopping, speeded up the automobile to escape, as he testified, the supposed highwaymen. As the automobile passed the first two officers, it was met by two more officers, one of whom had a red light, with which he attempted to flag the automobile. But the driver did not stop, and passed so close to the man with the red lantern as to nearly run him down. At about that time, one of the officers, Dalehart, who was one of the first officers to meet the car and give the order to stop, began running after it, shouting "stop," and fired four or five shots at the automobile from a thirty-eight caliber revolver, intending, as he testifies, to hit the tire of the automobile, cause it to deflate, and impede the progress of the car so that it would stop, or might be overtaken. At about the time the shots were fired, the automobile passed down the incline at the further end of the bridge, and two of the shots passed through the upper part of the automobile, one striking McCoy in the back, inflicting only a nominal injury, and the other bullet struck Mrs. Mitchell a little below her right shoulder blade, passed in an upward direction through her body, and out at the side of her throat. McCoy drove to a nearby house, reported a holdup, that the lady with him had been shot, and then, as she was unconscious, he hastened back and took her to the Renton hospital.

The trial court found:

"The defendants Hughes, Stewart, Flynn and Dalehart concerted and assembled together for the common purpose and with the joint intent of stopping at night, on a public highway and without a warrant, any automobile which they suspected of containing intoxicating liquor being conveyed in violation of law, and if such liquor should be found, of prosecuting the person or persons in possession thereof, and at the time of the firing of said shots were stationed as aforesaid and were engaged in said common purpose. Although the firing of said shots was not intended or contemplated by any one except Dalehart, they were fired by him in pursuance of the aforesaid common purpose and joint intent, namely, the stopping of said automobile as aforesaid."

Judgment was entered in favor of the respondents and against the appellants and the defendant Peter Dalehart for the sum of $4,000, from which judgment this appeal is taken.

It appears to be admitted that the appellants combined to wait upon the bridge or highway and intercept and stop, or attempt to stop, travelers thereon for the purpose of finding some person in the act of violating the law; and it becomes necessary to inquire first whether this was an unlawful act. We know of no law in force in this state which will justify these acts. No statute exists which authorizes any such action without a warrant, and we think no court has held that such facts justify an arrest, or an attempted arrest, at common law without a warrant. The rule covering an arrest for a misdemeanor without a warrant is well stated in the following quotation:

"Although the defendant seeks to justify his conduct on the ground that he was an officer making a legal arrest and using no more force than was necessary, the law is well settled that even an officer may not arrest for a misdemeanor without a warrant on

information or suspicion, unless the misdemeanor was actually committed in his presence." *Caffinni v. Hermann,* 112 Me. 282, 91 Atl. 1009.

We think it follows, then, that the appellants, no matter how laudable their intent or how justifiable their motive, combined to do an unlawful act.

But they contend that, even so, the act which they combined to do was not the proximate cause of the injury complained of, and cite an extract from the opinion of the court in *Milwaukee & St. Paul R. Co. v. Kellogg,* 94 U. S. 469:

"But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

What is meant by "wanton wrong," as that expression is used in the citation given above? Webster's New International Dictionary defines "wanton" as "Reckless; heedless; malicious; as, *wanton* mischief." And Bouvier's Law Dictionary defines "wantonly" as, "Done in licentious spirit, perversely, recklessly, without regard to propriety or the rights of others; careless of consequences, and yet without settled malice."

While the acts of appellants might not be wanton against a person actually found violating the law, yet, as against the respondent, who was peacefully and lawfully upon the public highway, were not the acts complained of reckless, heedless and done without regard to her rights? Without attempting a definite answer to that question, because unnecessary to the decision of this case, it would yet seem that, in law, and as applied to the rights of the respondent, the acts

complained of might well be held to be wanton. Whether wanton or not, the going upon the highway and unlawfully attempting to stop the respondent in this case appears to be the proximate cause of the injury which she received.

But, say the appellants, the shooting was not agreed upon in advance; in fact, they had been advised not to use any violence; and the appellant Hughes had specifically warned all the others to use no force or violence; and that the shooting was caused by some wild impulse in the mind of the defendant Dalehart, who fired the shot.

In the language of the United States supreme court, in the case of *Milwaukee & St. Paul R. Co. v. Kellogg, supra,* which was cited and relied upon by the appellants, from which we have already quoted, will be found the answer to this proposition:

"The true rule is, that what is the proximate cause of the injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. 2 Bl. Rep. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

Again, the court says in that case:

"We do not say that even the natural and probable consequences of a wrongful act or omission are in all

cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury."

And again:

"In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of the jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies . . ."

Was not Dalehart's impulse to shoot born of the refusal of the driver to stop the automobile? Was not that refusal to stop the result of the unlawful command? Who will say that, if the appellants had not combined to intercept and stop the respondent and acted in pursuance thereof, there would have been any shooting? How can it be found that the impulse to shoot was a new and independent agency, when it followed as a natural sequence the failure to obey the unlawful demand to stop? "Was there an unbroken connection between the wrongful act and the injury?" "Did the facts constitute a continuous succession of events, so linked together as to make a natural whole?" Was there any other independent intervening cause? The trial court saw none; we can see none; and the text books and text writers generally sustain this view. In such cases, so far as can be found in the

reports, it has universally been held that the original wrongful act was the proximate cause of the injury.

"Where two or more are engaged in an unlawful enterprise, each is individually responsible for all injuries committed in its prosecution and this, although the specific injury was done by one of the parties alone. Here the liability of the other is founded upon the concert of action." 38 Cyc. 487.

"While one who suffers from a conspiracy forbidden by the criminal law may maintain a civil action for damages caused by the parties to the combination, it is not essential to civil liability for a consummated conspiracy to do an unlawful act that the means resorted to to effect the purpose should be criminal or that the act should be criminal. It is sufficient if it be to commit an act wrongful because of its affording a ground of action, either civilly or criminally." 12 C. J. 581.

And on page 610:

"Where two or more persons enter into a conspiracy, any act done by either in furtherance of the common design and in accordance with the general plan becomes the act of all, and each conspirator is responsible for such act. This is true even though the results were not specifically intended or the means specifically agreed on. Every conspirator is liable for all overt acts illegally committed in pursuance of the conspiracy and for the consequent loss whether he was an active participant or not . . ."

See, also, *Kirkwood v. Miller*, 5 Sneed (Tenn.) 455, 73 Am. Dec. 134; *Daingerfield v. Thompson*, 33 Gratt. (Va.) 136, 36 Am. Rep. 783; *Murphy v. Wilson*, 44 Mo. 313, 100 Am. Dec. 290.

And this court in *Abb v. Northern Pac. R. Co.*, 28 Wash. 428, 69 Pac. 954, 92 Am. St. 864, 58 L. R. A. 293, has said:

"It is, and has long been, a generally recognized rule that there is no line of separation between the

liability of joint tort feasors. The tort is a thing integral and indivisible, and any claim for injuries arising therefrom runs through and embraces every part of the tort. The liability of one cannot be carried into any portion of the joint tort that is not followed by an equal liability of the other tort feasors. Each is liable for the whole, and the injured party may pursue one separately, or he may pursue all jointly, or any number jointly less than the whole number."

The appellants contend that the respondent was violating the speed laws of the state and city, and the state and city laws with reference to the possession of liquor. But we find nothing in these contentions. The evidence shows that the automobile in which the respondent was a passenger was traveling at about fifteen miles per hour until intercepted by the appellants. And in view of the circumstances of being unlawfully intercepted and ordered to stop by unknown men displaying nothing to indicate that they were officers of the law, at midnight and on a public highway, we are unwilling to say that it was unlawful to increase the speed for the purpose of escaping from supposed highwaymen. In any event, such increase of speed, even if unlawful, occurred only after the unlawful attempt by the appellants to stop the respondent.

Nor was the possession of less than a pint of whiskey, which was found in the automobile, necessarily unlawful, especially as respondent is not shown to have known that the whiskey was in the automobile.

While giving the fullest effect to the acknowledged and admitted fact that the appellants were in good faith intending to do only their duty, and recognizing that, if they had in fact intercepted and stopped no one except some person engaged unlawfully in transporting liquor, their actions would have been approved by all right thinking citizens; yet, when an officer of

the law, without a warrant, and upon general suspicion only, at midnight, without making known his official character, attempts to intercept and stop a peaceful citizen lawfully pursuing his way upon the public highway, and personal injuries result therefrom, he acts at his own peril, and the good intention of the officer is no defense. Nor did the advice given by the city attorney justify the act. For, as we read the evidence, that advice did not contemplate the stopping of any traveler except one engaged in the act of unlawfully transporting intoxicating liquors. This falls far short of justification.

No question is raised here as to the amount of the recovery, and we have not considered that feature of the case. Much as we regret that the burden of compensating the respondent must fall upon men who intended to do no wrong, we are yet constrained by the law as we find it to affirm the judgment of the trial court.

Judgment affirmed.

MAIN, C. J., PARKER, MITCHELL, MACKINTOSH, CHADWICK, and MOUNT, JJ., concur.

FULLERTON, J. (dissenting)—I am unable to concur in the conclusion reached by the majority. A careful reading of the record has convinced me that the evidence does not justify the finding of the trial court, to the effect that the defendants Hughes, Stewart, Flynn, and Dalehart concerted and assembled together for the common purpose and with the joint intent of stopping at night, on a public highway and without a warrant, any automobiles which they suspected of containing intoxicating liquor being conveyed in violation of law. On the contrary, I think the evidence clearly demonstrates that their purpose was merely to

signal suspected automobiles to stop, without any intent to enforce a stopping if the driver of the automobile refused to obey the signal.

This being their purpose and intent, I am unable to conclude that appellants were engaged in an unlawful enterprise. In this state it is an offense against the laws to transport liquor on the highways in quantities in excess of a limited amount. These officers, having information that such an offense was being perpetrated, owed a duty to intercept the perpetrators. If they caught the perpetrators in the commission of the act they could lawfully arrest them, although they had no warrant of arrest. Under our statutes, as at the common law, an officer may arrest, without a warrant, an offender caught in the commission of an offense, even though the offense be a misdemeanor.

I need not argue that, when two or more persons are acting lawfully together in the furtherance of a common lawful purpose, one is not liable for an assault committed by another, if committed without his concurrence, although committed in furtherance of the common purpose. This is horn-book law.

Since, therefore, I can find no unlawful intent or purpose on the part of the appellants, and can find no participation in the excessive unlawful act resulting in the injury to the respondents, I can but conclude that the recovery permitted to stand is contrary to the rules governing in such cases. I think the judgment should be reversed.

HOLCOMB, J. (concurring)—I disagree with the restrictive statement of the law of arrest as pronounced in the majority opinion. It is the law, as stated by Judge Fullerton in his dissent, that the "officers, having information that an offense was being perpetrated, owed a duty to intercept the perpetrators. If they

caught the perpetrators in the commission of the act, they could lawfully arrest them, although they had no warrant of arrest. Under our statutes, as at the common law, an officer may arrest, without a warrant, an offender caught in the commission of an offense, even though the offense be a misdemeanor."

But neither does this statement cover the ground fully.

"While an officer may arrest without a warrant under certain circumstances, as already seen, he may not act arbitrarily, but must exercise his discretion in a legal manner, using all reasonable means to avoid mistakes. The reasonable and probable grounds that will justify an officer in arresting without a warrant one whom he suspects of felony must be such as would actuate a reasonable man acting in good faith. The rule is substantially the same as that in regard to a probable cause in actions for malicious prosecution, and there is no difference in its application between arrests for felonies and arrests for misdemeanors. The necessary elements of the grounds of suspicion are that the officer acts upon a belief in the person's guilt, based upon facts or circumstances within the officer's own knowledge, or upon information imparted to him by reliable and credible third persons, provided there are no circumstances known to the officer sufficient to materially impeach the information received. . . . An arrest without a warrant is illegal when it is made upon mere suspicion or belief, unsupported by facts, circumstances, or credible information calculated to produce such suspicion or belief." 5 C. J. 416.

In this case, none of these officers, nor the acting officer or private citizen, took any precautions to avoid mistakes in arresting innocent persons. They had no foundation for belief that the persons intercepted were the guilty persons, and they took no precautions, such as wearing uniforms, badges or otherwise, to give

notice of their official character to any unknown persons they might intercept and arrest without warrant, upon their information. Defendant Dalehart, the officer who fired the shots and who has not appealed from the judgment below, certainly could hardly justify his mistaken act.

The trial court found that Dalehart, together with Hughes, Stewart and Flynn, "concerted and assembled together for the common purpose and with the joint intent of stopping at night, on a public highway and without a warrant, any automobile which they suspected of containing intoxicating liquor being conveyed in violation of law, and if such liquor should be found," etc. This finding, it seems to me, is justified by the facts, and merely puts all the parties upon the same ground as would be private citizens so engaged, for their joint intent of stopping at night, on a public highway and without a warrant, any automobile which they suspected of containing intoxicating liquor being conveyed in violation of law, was unlawful and unjustifiable. The assault and injury happened in consequence thereof and in pursuance of their joint purpose and common intent to stop any such suspected automobile, and resulted in the joint or common commission of the tort and damage.

The facts being so found and being supported by the record, the judgment appealed from was proper. I therefore concur in the result for the foregoing reasons.

[No. 14928. Department One. November 20, 1918.]

ISAAC COHEN *et al.*, *Appellants*, v. McKENNA LUMBER COMPANY *et al.*, *Respondents*.[1]

FORCIBLE ENTRY AND DETAINER (3, 10) — DEFENSES — EVIDENCE — POSSESSION AND TITLE. In an action of forcible entry and detainer, evidence is admissible that the premises actually used by defendants, although inclosed in plaintiffs' fences, did not belong to them because not a part of the lands described in the complaint or notice to vacate, and the same defeats the action.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered February 5, 1918, upon findings in favor of the defendants, dismissing an action for forcible entry and detainer, tried to the court. Affirmed.

H. W. Lueders, for appellants.

T. W. Hammond and *H. G. & Dix H. Rowland*, for respondents.

MACKINTOSH, J.—The appellants, being the owners of twenty acres described as north half of the northwest quarter of the southwest quarter of section 5, township 17 north, range 3 east, W. M., began an action of forcible entry and detainer against the respondents, claiming that the respondents had forcibly entered and were detaining the above described property. Upon the trial, evidence was introduced showing that the property actually being used by the respondents was not located in the quarter section owned by the appellants, but was property which was included within the appellants' fences. The admission of this evidence is complained of by the appellants for the reason, as they claim, that thereby the title of property was being tried in an action of forcible entry and detainer.

[1]Reported in 176 Pac. 1.

It is the established law that, in such an action, the title is not to be litigated. But, as we view the case, a dispute over a boundary line was not being determined, nor was it being determined as to who was entitled to the premises being occupied by the respondents by reason of a better title thereto. The testimony was admissible to show that the respondents were not occupying the property described in the statutory notices and alleged in the complaint as being the property of the appellants. When the testimony developed that the property, although lying within the appellants' fence, was not the property described in their notice to vacate, nor in their complaint, the appellants' case failed, and the court was correct in entering judgment of dismissal.

Judgment affirmed.

MAIN, C. J., CHADWICK, and MITCHELL, JJ., concur.

[No. 15043. Department One. November 20, 1918.]

LEE M. ALLEN, *Appellant*, v. LIDA A. STARR, *Administratrix, etc., Respondent.*[1]

PROCESS (41)—PROOF OF SERVICE—BURDEN OF PROOF. After judgment, the burden is upon the person attacking the service to show by clear and convincing evidence that the same was irregular.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 25, 1918, in favor of the defendant, in an action to vacate a default judgment, tried to the court. Affirmed.

C. S. Goshert, for appellant.

Turner & Hartge, for respondent.

[1]Reported in 176 Pac. 2.

MACKINTOSH, J.—The appellant is seeking to have vacated a default judgment entered against him on the 9th day of November, 1916, claiming that there had never been any legal service of summons and complaint. The sheriff's return showed service by leaving a copy of the summons and complaint with the wife of the appellant, at the place of the usual abode of appellant, on October 17, 1916. No appearance having been made, default judgment was taken, and thereafter execution was issued and the appellant's property sold to satisfy the judgment. The trial court, after hearing the evidence introduced by appellant, and that introduced by respondent, refused to open and vacate the default judgment, holding that personal service had been made, as shown by the sheriff's return.

While it is true that a sheriff's return is not conclusive evidence of the facts therein stated, it is also true that, after a judgment has been rendered upon proof made by the sheriff's return, such judgment should only be set aside upon convincing evidence of the incorrectness of the return, in order that judicial conclusions may possess regularity and stability. After judgment, the burden is upon the person attacking the service to show, by clear and convincing proof, that the service was irregular. *McHugh v. Connor,* 68 Wash. 229, 122 Pac. 1018; 32 Cyc. 516. An examination of the testimony in this case does not disclose such a degree of proof as meets the burden which rests upon the appellant, and for that reason we affirm the action of the lower court.

MAIN, C. J., TOLMAN, CHADWICK, and MITCHELL, JJ., concur.

[No. 14924. Department One. November 22, 1918.]

LUCY S. NORTON, *Respondent*, v. THE STATE OF WASHINGTON, *Appellant*.[1]

EVIDENCE (175-179) — PAROL EVIDENCE TO VARY WRITING — AMBIGUITY—SCHOOL TEACHER'S CONTRACT. A teacher's contract allowing excuse from work in the summer school without providing the conditions of such excuse, and providing that the conditions of services as heretofore existing will prevail the coming year, is so ambiguous as to admit of parol evidence that it had been the custom to excuse a teacher only upon his or her request.

SCHOOLS AND SCHOOL DISTRICTS (48-50)—TEACHERS—CONTRACTS—CONSTRUCTION. A teacher's contract providing that the teacher shall forfeit pay for the two summer months when excused "at his own request" upon two months' notice to the board, leaves excuse from work optional with the teacher.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered March 12, 1918, in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

The Attorney General and *John A. Homer, Assistant*, and *C. E. Arney, Jr.*, for appellant.

Kellogg & Thompson, for respondent.

CHADWICK, J.—In May, 1916, the board of trustees of the Bellingham Normal School elected the plaintiff as a teacher for the year commencing September 1, 1916, and ending August 31, 1917. The contract is evidenced by the notice of election and acceptance following:

"State Normal School, Bellingham, Wash.
"Notice of Election.

"Miss Lucy S. Norton: July 3, 1916.

"I am directed by the board of trustees to notify you that at their meeting May 11 you were elected teacher of the Bellingham State Normal School for

[1]Reported in 176 Pac. 347.

the year, September 1, 1916, to August 31, 1917, at an annual salary of $2,160, payable in 12 equal monthly payments of $180.

"I am also directed to state that the conditions of service, as hitherto existing will prevail the coming year.

"That the school year shall begin on the first Tuesday in September and close about the first of the following June; that the summer session shall begin on the Monday following the annual commencement, and close about the first of the following August.

"That the annual salary of each teacher shall be divided into equal monthly payments.

"That the salary of any teacher shall not be paid for the months of July and August when such teacher is excused from teaching in summer school by the board of trustees.

"That each member of the faculty shall, without prejudice, be entitled to be excused from work in summer session each alternate year.

"This notification of election is made in duplicate. Acceptance of election will be made by signing one copy and returning to registrar.

"Failure to accept within thirty days will be regarded as rejection of election.

"Respectfully yours,
"J. M. Edson, Registrar.

"Election accepted July 20, 1916.
"Lucy S. Norton,
"Signature."

Plaintiff had been employed by the board of trustees since the year 1910, contracts of a similar nature being made from year to year. In May, 1912, the trustees of the several normal schools of the state adopted the following resolutions:

"May 23, 1912.

"To the Members of the Faculty,
"Bellingham State Normal School.

"At a meeting of the boards of trustees and principals of the three normal schools of the state of

Washington, held in Cheney, April 3rd last, the appended resolutions were adopted:

"(1) That the school year shall begin on the first Tuesday in September of each year and close about the first of June following.

"(2) That the summer session shall begin on the Monday following the annual commencement and close not later than August first following.

"(3) That the month of August shall be known as the regular midsummer vacation.

"(4) It shall be the duty of the principals of the three normal schools each year before the publication of the annual catalogues to prepare a uniform calendar for use in all of the normal schools in the state for the following school year.

"(5) The salaries of all teachers regularly employed by the normal schools in the state shall be paid, each year, in twelve equal monthly payments beginning with September; but it shall be understood that the salary of any teacher shall not be paid for the months of June and July, when such teacher, at his own request, is excused by the board of trustees from teaching in the summer session of the institution for that year, and it shall be further understood that each member of any faculty shall, without prejudice, be entitled to be excused from work in the summer session each alternate year, under conditions stated in this paragraph.

"(6) That teachers who may wish to be excused from service in any summer school shall so signify such desire to the principal not later than April 1st preceding the summer session.

"(7) That it is the sense of this meeting that a uniform contract would be advantageous, and that the matter be submitted to Mr. Lund to prepare a draft with a view of having same approved and adopted by each of the normal schools."

The board of trustees of the Bellingham State Normal School notified the members of its faculty, including plaintiff, of these resolutions, saying:

"But I am directed by the trustees in lieu of offering you a contract to notify you of your re-election May 7th, 1912, as a member of the faculty and to ask your acceptance or rejection within two weeks from date hereof. Failure to comply with this request within the time specified will be regarded as a rejection.

"(a) Your election is for the term of one year, commencing September 1, 1912, and ending August 31, 1913.

"(b) Your monthly salary until the first of April, 1913, is to be the same as present and payable in the same manner.

"(c) Your monthly salary from April 1, 1913, to August 31, 1913, is not to be less than at present, but any increase from April 1, 1913, to be contingent upon the amount of funds available under the new millage tax law and the satisfaction of the board of trustees that any increase is justifiable.

"(d) It is understood that the summer school of 1912 shall be of the length and be administered as has been planned for several months and shall in nowise be changed by the action set forth in the resolutions quoted.

"The summer school of 1913 and subsequent summer schools, until further notice, shall be subject to the conditions set forth in paragraph 5 on the preceding page.

"This notification is in duplicate. Attached to and made a part of one copy is a blank form of acceptance. Please sign and deliver to the registrar.

"Respectfully yours,
"By Order Board of Trustees.
"J. Wayland Clerk, Registrar."

In the contract made by the trustees with plaintiff for the year 1913 is the following:

"I am also directed to state that the conditions of service as is now existing, viz., those adopted by the normal schools of the state a year ago, and ratified by the board of trustees of this institution, shall prevail the coming year."

Then follow the stipulations as in the present contract. The contracts for the year 1914 employed the same words. The contract sued upon and the contract for 1915 employed the words following: "I am directed to state that the conditions of service as hitherto existing will prevail the coming year." In the spring of 1917, plaintiff and other teachers, who have assigned their claim to her for the purposes of this suit, were notified by the board of trustees that they would be excused from service in the summer school, and the trustees refusing to pay the salary of plaintiff and of her several assignors for the months of July and August, this action was brought to recover the amounts alleged to be due.

It was the theory of the trial judge that the contract was ambiguous and uncertain and called for parol testimony in aid of construction as to that part of the contract providing that "the conditions of services as hitherto existing will prevail the coming year." The resolutions adopted by the trustees of the several normal schools and testimony tending to prove that it had been the custom of the trustees to excuse a teacher only upon his or her request was introduced over the objection of counsel for the defendant, whose theory is that the contract is complete and certain of itself and that, when so treated, there can be no recovery. Counsel would read the contract as if it were "the conditions of service as hitherto existing will prevail the coming year;" that is to say, the conditions are as set out under paragraphs 1, 2, 3, and 4. In other words, that the contract recites in itself the conditions of service.

While to the writer and to JUDGE PARKER the contract seems to be certain and to be capable of construction without reference to other or parol testi-

mony, a majority of the department are persuaded that the theory adopted by the trial judge is correct and that we should adopt that theory in arriving at our conclusion. Before doing so, however, I deem it not out of place to justify our personal opinion that a recovery may be had upon the theory advanced by counsel for defendant; that is, that the contract is not ambiguous, but is certain and sufficient in terms. To reach the conclusion arrived at by counsel we would have to ignore the first essential of the contract, which, being "accepted," became an absolute promise to pay an annual salary of $2,160 in twelve equal monthly payments of $180.

The contract defines a school year as beginning the first Tuesday in September and ending, including the summer school, on or about the first day of the following August. It being the fair intent of the contract that there shall be one month's vacation. It repeats and emphasizes the fact that the annual salary of each teacher shall be divided into equal monthly payments, and this is the phrase that counsel relies on,

"The salary of any teacher shall not be paid for the month of July and August when such teacher is excused from teaching in summer school by the board of trustees."

If this were all of the contract, we would have no difficulty in following counsel, but it is a cardinal principle of statutory construction that contracts must be taken by their four corners and effect given to every stipulation therein contained; that which goes before, as well as that which comes after. This is no more than to say that courts will not tear any part of a contract from its context, but will keep it in its setting and give it weight only as it is influenced by other

provisions. Paragraph three must be read in connection with and, under the rule suggested, as a part of paragraph four: "Each member of the faculty shall, without prejudice, be entitled to be excused from work in summer session each alternate year," so that the real contract is that each member of the faculty shall, without prejudice, be *entitled* to be excused from summer school each alternate year, but the salary shall not be paid for the month of July and August when such teacher is excused from teaching in summer school by the board of trustees.

Keeping in mind the general obligation of the state to pay for the services of plaintiff for the period of one year, and of plaintiff to give her services for the like term, the word "entitle," in paragraph four of the contract which provides for a contingency, is significant. The word "entitle" is defined by English in his Law Dictionary: "To confer a claim or right upon." It implies a privilege to be exercised by the one for whose benefit the word is used. In *English's Ex'r v. McNair's Admr's,* 34 Ala. 40, in construing a law providing that "no married woman is entitled to letters testamentary, unless her husband consents thereto," the court said, at page 48:

"It says she is not 'entitled.' She has no claim, no right to be appointed."

In *People's Trust Co. v. Smith,* 30 N. Y. Supp. 342, in construing the words "shall be entitled to all the provisions and privileges of law relating to charitable institutions," the court said:

"To 'entitle' is defined as 'to give a title, right, or claim; to give a right to demand or receive; to furnish with grounds for claiming, with a direct object of the person claiming, and a remote object of the thing claimed.' It is directly opposed to the idea of imposing an obligation or limitation, but gives to the

person named a right to demand or receive. Thus, when this corporation was said to be entitled to all the provisions and privileges of law relating to charitable institutions, it was given the right to have and enjoy the provisions and privileges; not to have imposed upon it limitations and disabilities which it did not ask for."

We find few definitions of the word "entitle," but so far as the courts have dealt with the word, it may be gathered that the word means the granting of a privilege or right to be exercised at the option of the party for whose benefit the word is used, and upon which no limitation can be arbitrarily imposed.

This must be so, for the teacher has bound herself to give her services for twelve months, with the privilege of claiming exemption from the contract in each alternate year if her contract runs for more than one year or from year to year, in which event she will waive her right to claim for the time that she is excused.

But, upon the other theory, to hold that the contract is ambiguous in that the conditions hitherto existing are not set out, is to decide the case. For the moment that we grant the right to receive such testimony we meet the conditions as set forth in the resolutions adopted by the trustees of the several boards and ratified, adopted, and made effective by the trustees of the Bellingham Normal School. Upon this theory, granting that sections four and five of the contract allow a teacher to be excused, and that she will waive her right to payment in the event that she is excused, the conditions upon which she may be excused are not set out; that is, whether upon her request or at the instance of the board, and they thus become a subject of oral testimony. That it was the purpose and intention of the board of trustees of the

three normal schools of the state and the Bellingham State Normal School to leave it optional with a teacher whether she desired to be excused cannot be denied. Section five, after emphasizing that the teacher shall be paid in twelve monthly payments, provides that it is understood that the salary of any teacher shall not be paid for the months of July and August when such teacher, "at his own request," is excused by the board of trustees; and further, it is understood that each member of the faculty shall, without prejudice, be entitled as a matter of right to claim exemption from work in the summer session in each alternate year. To be excused at one's own request negatives the idea of an excuse at the request of another. To protect the board from the possibility of a shortage in teachers it is provided that teachers who desire to be excused from services in the summer school shall signify such desire to the principal not later than April 1st. The option of the teacher is further confirmed by a reference to the action of the board of trustees in adopting and approving these resolutions, wherein they say: "The summer school of 1913 and subsequent summer schools, until further notice, shall be subject to the conditions set forth in paragraph five on the preceding page."

Although the resolutions adopted by the several boards of trustees of the Bellingham State Normal School, together with the record made by the local board, were brought to the attention of the teachers by copy and sent to each of them as evidence of the conditions which would prevail "until further notice," it is not contended that the board ever took any further or subsequent action with reference thereto. So that, the conditions of service being made plain, and the option of the teacher being certain, it follows that the board of trustees are bound by their

contract to pay an annual salary in a certain sum, in monthly payments, unless the teacher "at his own request," to be filed not later than a day certain, shall ask to be excused.

While counsel have cited many authorities to sustain the right of the court to receive testimony where contracts are ambiguous and where one contract refers to another, or to another document, it would be a work of supererogation to review them, for the case must be resolved by the contract itself, and a theory of decision being adopted, the principles applying are too plain for discussion.

The judgment of the lower court is affirmed.

TOLMAN and PARKER, JJ., concur.

MAIN, C. J., concurs in the result.

[No. 14944. Department Two. November 22, 1918.]

W. E. HANSON, *as State Bank Examiner, etc., Respondent,* v. LOUIS ROESCH *et al., Appellants,* CHARLES DRAKE *et al., Defendants.*[1]

BILLS AND NOTES (65, 73-6)—NEGOTIATION—HOLDER IN DUE COURSE—AFTER DUE—SET-OFF—STATUTES. Where a note is not indorsed by the payee until it is overdue, the holder is not a holder in due course and the note is subject to offsets against the payee, under Rem. Code, § 3440, providing that, for the purpose of determining whether a transferee is a holder in due course, the negotiation takes effect as of the time the indorsement is actually made, and Id., § 3443, requiring that the transferee became holder before the note was overdue.

TRIAL (150)—JUDGMENT NON OBSTANTE—AFFIRMATIVE RELIEF—FINDINGS. Where the court takes a case from the jury and grants affirmative relief, it becomes a trial by the court, requiring findings under Rem. Code, § 367.

[1]Reported in 176 Pac. 349.

EVIDENCE (153)—PAROL EVIDENCE TO VARY WRITING—RECEIPTS—AMBIGUITY. Unilateral letters or receipts are not conclusively binding and admit of parol evidence to explain the meaning of the words, "$775 to be credited on account."

SAME (157)—NATURE OF CONSIDERATION. Parol evidence is admissible to show that the consideration for deeds and written instruments was to be held in trust for the holder of, and credited upon, the notes of the grantors.

PARTNERSHIP (8, 41)—LIABILITIES OF DORMANT PARTNERS—ESTOPPEL. Where articles of limited partnership were not drawn under Rem. Code, §§ 8359-8368, nor a certificate of an assumed business name filed for the protection of the public, as required by Id., § 8369, a dormant or silent partner constitutes the visible partners agents of the partnership, and a creditor may offset his debt against the partnership.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered March 28, 1918, in favor of the plaintiff, notwithstanding the verdict of a jury rendered in favor of the defendants, in an action on promissory notes. Reversed.

Edwin H. Flick, for appellants.

C. H. Winders, M. M. Richardson, and *Hugh C. Todd,* for respondent.

HOLCOMB, J.—The state bank examiner, successor in interest of the German-American Mercantile Bank (defunct), in liquidating its affairs as required by law, prosecutes this action on three promissory notes aggregating $4,500 principal, with interest at eight per cent per annum, payable to the order of Mercantile Funding Company, a partnership. One note for $2,000, dated October 19, 1914, and payable on or before April 19, 1915, was signed, "Louis Roesch" and "Edward Roesch." It was indorsed, "Interest paid to April 19, 1916, Mercantile Funding Co., by W. J. Bruggemann." The second note, for $1,000, dated November 9, 1914, and payable on or before May 9,

1915, was signed, "Edward Roesch, Roesch Motor Car Co., and Louis Roesch." It was indorsed, "Interest paid to May 9, 1916. Mercantile Funding Co., by W. J. Bruggemann." The third note, for $1,500, dated November 28, 1914, and payable on or before April 19, 1915, was signed, "Roesch Motor Car Co., Edward Roesch." It was indorsed, "Interest paid to May 19, 1916. Mercantile Funding Co., by W. J. Bruggemann."

The defendants Roesch admit the execution of the notes and claim an offset, if valid, together with usury, would satisfy the obligation of these notes. They allege, in substance, that, on November 9, 1914, they agreed to, and did, turn in to Charles Drake and W. J. Bruggemann, who they allege were sole partners, so stated by them, comprising Mercantile Funding Company, a certain lot at a fixed price of $800, plus one-half of the profits to be derived by the erection and sale of a bungalow on the lot, which netted the Mercantile Funding Company $1,400; that, on March 27, 1915, defendants Roesch turned in an automobile at an agreed price of $1,150, which amount defendant Roesch paid in behalf of Drake and Bruggemann as the Mercantile Funding Company to the Velie Motor Car Company, and that both Drake and Bruggemann stated that they needed this car in the business and would use it in the business of the Mercantile Funding Company, that of building houses and loaning money; that, about September 4, 1915, defendants Roesch exchanged this car for a new one, charging $775 additional; that both the automobile charges were agreed to be credited upon the Mercantile Funding Company notes, and that it was again stated that these parties mentioned would use and needed the use of the car in the business of the Mer-

cantile Funding Company; that, on January 26, 1916, Drake and Bruggemann agreed to, and did, take over certain notes from one Anderson in the amount of $526, rightfully belonging to Roesch Motor Car Company as a balance due on the Anderson car, and agreed to credit same on the Mercantile Funding Company's notes herein referred to; that the foregoing credits were agreed upon immediately at the closing of the above transactions, and were, at various times thereafter, referred to by Drake and Bruggemann as having been given upon the notes; that defendants Roesch had no knowledge that defendant Guidicelli was a partner in the Mercantile Funding Company, and were led to believe, and did believe, that Bruggemann and Drake were the sole partners therein, until after September 1, 1916, when for the first time defendants Roesch knew that the notes had been pledged by the Mercantile Funding Company to the German-American Mercantile Bank, and that at that time the notes were unindorsed, overdue a year and a half, and showed no credits in favor of defendants Roesch; that defendants Roesch, under protest and without waiver of any and all their rights existent therein, as appears more fully in a certain contract, paid on the notes the sum of $500, on or about December 12, 1916, to the German-American Mercantile Bank; that, at all times herein mentioned and up to approximately October 1, 1916, W. J. Bruggemann was, and continued to act as, a director or trustee of the German-American Mercantile Bank, and was during all of the times manager of the Mercantile Funding Company, actively engaged in all of its operations and fully conversant with all of the matters herein recited, and the German-American Mercantile Bank had full knowledge of all of the transactions at the time of taking over the notes;

that the defendants Roesch paid as bonus one per cent per month for six months on the loan made represented by each of the notes, which interest or bonus is usurious, and they claim a credit for such usury. The defendants Roesch pray for a dismissal against plaintiff and the other defendants, and for a judgment against the German-American Mercantile Company for the return of $500 under that agreement made December 12, 1916. T. O. Paxton was dismissed from the action early in the trial.

The cause was tried by the court sitting with a jury, which returned a verdict for the defendants. The court granted a motion notwithstanding the verdict, and entered a judgment against defendants, and each of them, for the sum of $3,099.43, and against defendants Guidicelli and Drake, and each of them, for $2,428.92 additional. The defendants Roesch presented findings of fact to the court, but the court refused to make any findings. The defendants Roesch excepted to the court's refusal to make findings, and excepted to the judgment entered against them. The defendants Roesch appeal.

Appellants assign as errors: (1) Granting motion *non obstante veredicto*; (2) refusal to make findings after granting motion *non obstante*; (3) refusing testimony to explain receipts or letters (Roesch exhibits 2, 3, and 4), both as to undisclosed principal and as to consideration, and as affecting the interest of any parties not signatory thereto; (4) refusing testimony explaining inducement and consideration for the transfer of property, which consideration is to be paid by another; (5) that a dormant partner has no rights that he or she can assert where other parties have been led by the known parties to contract along certain lines, if the assertion of those rights would mili-

tate against the parties so contracting with the active partners; and (6) that the law provided ample protection to Guidicelli if she had insisted on filing the required form of firm name and style. We will digress somewhat before examining directly the errors assigned.

It is evident that the maker of a negotiable instrument may plead a set-off against the payee, provided the instrument has not been negotiated to a holder in due course for value. Under our statute of negotiable instruments, Rem. Code, § 3421, it is plain that instruments payable to order must be indorsed and completed by delivery. Rem. Code, § 3440, relating to transfer of negotiable instruments payable to order, is as follows:

"Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferrer. *But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.*" [Italics ours.]

As to who is a holder in due course, Rem. Code, § 3443, is as follows:

"A holder in due course is a holder who has taken the instrument under the following conditions:

"(1) That it is complete and regular upon its face;

"(2) *That he became the holder of it before it was overdue,* and without notice that it had been previously dishonored, if such was the fact;

"(3) That he took it in good faith and for value;

"(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." [Italics ours.]

The notes in question had not been indorsed by the payee until more than one year after due; therefore the holder of the notes cannot be considered as a holder in due course, and the maker of the notes may prove such offsets as would have been available to him against the payee of the notes prior to indorsement. The instructions given by the court to the jury relating to the offsets were proper had such testimony been allowed or not stricken, but with such testimony disallowed and stricken, there was nothing for the jury to pass upon, excepting the testimony of the purchase of the first automobile, usurious interest, $500 payment, and some letters or receipts relating to the offsets but referring to other parties than the Mercantile Funding Company; and the court should have either granted a new trial or instructed the jury within the scope of proof received.

The judgment *non obstante* granting affirmative relief is without findings. When the court takes the case from a jury and grants affirmative relief it, in effect, becomes a trial by the court, which in law actions requires findings, under Rem. Code, § 367. *Boe v. Hodgson Graham Co.*, 97 Wash. 444, 166 Pac. 779; *Western Dry Goods Co. v. Hamilton*, 86 Wash. 478, 150 Pac. 1171; *Colvin v. Clark*, 83 Wash. 376, 145 Pac. 419.

What we have said covers the first two assignments of error, and we will next proceed with number 3. It deals with the court's exclusion of certain testimony explanatory of certain unilateral letters or receipts. These certainly are not conclusively binding on the defendants Roesch, and the explanation should have been allowed in regard to the meaning of "$775 to be credited on account," in defendants Roesch's exhibit No. 4. The admission of this testimony would not

violate the rule that it would vary the effect of a written instrument and that such is the best evidence.

As to the next assigned error, the transaction was one relating to real estate. Defendants Roesch did not attempt to vary the effect of the deeds or written instruments, but attempted to show that the consideration received under those written instruments was held and received by Drake in trust for the Mercantile Funding Company, and that it was agreed that this consideration should be credited upon the notes. This we think, under well settled principles, should have been admitted, and without violating any rules affecting real estate transfers.

The fifth and sixth assignments of error relating to dormant partners may be discussed together. Neither were articles of co-partnership drawn, making the Mercantile Funding Company a limited partnership, as required by Rem. Code, §§ 8359 to 8368, nor was the certificate of assumed business name filed according to the statute, Rem. Code, § 8369. This would protect the public dealing with the partnership, and where such requirements have not been fulfilled, a dormant or silent partner must be considered as having acquiesced in and constituted the visible partners agents to act for the partnership. The rule is elementary that, where a dormant partner permits the business world to believe that the ostensible partners are the owners of the business, he is estopped from claiming to the contrary against those who have in good faith acted upon such appearance, and cannot be heard to insist that, under such circumstances, a creditor has not the right to set off his debt against such partnership. *Willey v. Crocker-Woolworth Nat. Bank,* 141 Cal. 508, 75 Pac. 106.

For the foregoing errors, the judgment will be reversed and the cause remanded for new trial.

PARKER and FULLERTON, JJ., concur.

[No. 14982. Department One. November 22, 1918.]

In the Matter of the Guardianship of NELLIE IRENE and MARIE MARGARET HOGEN, *Minors.*
C. A. STUDEBAKER *et al.*, *Appellants*, v. LILLIAN M. HOGEN, *Respondent.*[1]

GUARDIAN AND WARD—APPOINTMENT BY WILL — VALIDITY — STATUTES—REPEAL. The act of 1860, Rem. Code, § 1643, providing that the father may by will appoint a guardian for his minor children, was repealed by the act of 1879, Rem. Code, § 5932, providing that, upon the father's death, the mother shall come into as complete control of the children as the father does in case of the mother's death; and makes such a provision in a father's will void.

SAME—APPOINTMENT—MOTHER. The appointment of a mother as guardian of minor children upon the death of the father is proper where she was a suitable and proper person and there was no showing to the contrary.

SAME—APPOINTMENT—NECESSITY OF PROPERTY. Where a father left his property to trustees for the benefit of minor children until they became of age, no guardian of their estate can be appointed, since the record discloses no estate belonging to the minors.

Appeal from an order of the superior court for Lewis county, Reynolds, J., entered June 3, 1918, denying a petition for the appointment of guardians for minors, and appointing another as guardian of their estates. Affirmed in part and reversed in part.

C. A. Studebaker, for appellants.

Forney & Ponder, for respondent.

MACKINTOSH, J.—Richard Hogen died on April 28, 1917, and was survived by Lillian M. Hogen, the re-

[1]Reported in 176 Pac. 339.

spondent in this action, and two minor daughters. By will dated August 10, 1914, Hogen left his one-half of the community property in trust to be used for the education of his children, and appointing the appellants trustees, and also named them as guardians of both the estates and persons of the minors. The will having been admitted to probate, and the appellants having proceeded to administer the trust, they applied to the superior court in this action for the confirmation of their appointment as guardians of the estates and persons of the minors. The court refused to confirm these appointments made in the will, and appointed the mother. Appellants appeal from this order, relying on their appointment as testamentary guardians, and contending that the probate code of 1917, having been passed after the date of the will, could not affect the right which, they assert, existed at the time of the making of the will for the father to name the guardians, under Rem. Code, § 1643.

The foregoing section of the code, which was enacted in 1860, provides that a father may, in his last will, appoint a gnardian for his minor children; but, as we view it, this section was repealed in 1879, by the provision which appears in Rem. Code, § 5932, wherein it is provided:

"In case of the father's death, the mother shall come into as full and complete control of the children and their estate as the father does in the case of the mother's death."

It therefore follows that the provision in Hogen's will whereby he attempted to appoint the appellants as guardians of the estates and persons of his children was void at the time of the making of the will, and it is therefore unnecessary for us to consider the

effect of § 210 of the probate code of 1917 (Laws of 1917, p. 703), which provides:

"When either parent is deceased, the surviving parent of any minor child may, by his last will in writing, appoint a guardian or guardians for his minor child."

It was not incumbent upon the court in this proceeding to confirm the appointment contained in the will, and the court was correct in determining what the best interests of the minors required in the matter of the appointment of their guardian. Having determined that the mother was a suitable and proper person, and there being no showing to the contrary, we affirm her appointment as guardian of the persons of her two daughters.

The court erred, however, in making the appointment of a guardian of their estates, for the reason that the record discloses no estates in the minors which permits the appointment of a guardian; the law being that a guardian of an estate is not to be appointed until it is shown that the prospective ward "has property in the county needing the care and attention of a guardian." By his will, Hogen left his property, not to his children, but to the appellants, as trustees, and what remains of the trust property after the terms of the trust have been fulfilled will not come into the possession of the children, by the terms of the will, until after they have become of age.

The action of the lower court will be affirmed in appointing the respondent guardian of the persons of Nellie Irene and Marie Margaret Hogen, and will be reversed as to her appointment as guardian of their estates.

MAIN, C. J., TOLMAN, CHADWICK, and MITCHELL, JJ., concur.

[No. 15045. Department One. November 22, 1918.]

THE STATE OF WASHINGTON, *on the Relation of King County, Plaintiff*, v. THE SUPERIOR COURT FOR PIERCE COUNTY, *W. O. Chapman, Judge, Respondent.*[1]

COUNTIES (93)—ACTIONS—CAPACITY TO BE SUED—VENUE—STATUTES. The effect of Rem. Code, § 951, giving a right of action against a county for injury by some act or omission of the county where none existed at common law, is to make the county answerable under the general rules of procedure in the superior courts, and liable thereunder to suits in other counties where the venue is local.

STATUTES (54)—CONSTRUCTION—REMEDIAL ACT. Statutes providing remedies are to be liberally construed.

COMMON LAW (4)—OPERATION AND EFFECT—VENUE. Common law rules of procedure having been abolished by Rem. Code, § 153, our common law, preserved only when not inconsistent with the laws of the state by Id., § 143, is a rule of decision and not a rule of practice, and common law rules of practice as to venue cannot be allowed to defeat a right of action.

VENUE (3)—NATURE AND SUBJECT OF ACTION—INJURY TO REAL PROPERTY—ACTION AGAINST COUNTY. Rem. Code, § 204, providing that actions for the recovery of injuries to real property shall be brought in the county where the subject of the action is situated is general, applying to actions against counties; hence such an action against two counties is local and properly brought in the county where the land was situated, notwithstanding that neither the common law, nor any express statute, authorized an action against a county beyond its limits.

Application filed in the supreme court October 2, 1918, for a writ of prohibition to the superior court for Pierce county, Chapman, J., to prohibit further proceedings in a cause. Denied.

Alfred H. Lundin and *Frank P. Helsell*, for relator.

Davis & Neal, for respondent.

[1]Reported in 176 Pac. 352.

CHADWICK, J.—Pursuant to chapter 54, Laws of 1913, p. 156, the counties of King and Pierce undertook the improvement of the White, Stuck and Puyallup rivers by straightening, widening, and deepening the banks and channels, to the end that recurrent damage by winter floods might be avoided in the future. The Tacoma Meat Company, of which Henry Conger is receiver, is the owner of certain lands abutting the Puyallup river in Pierce county. The receiver brought an action in Pierce county against the counties of Pierce and King to recover damages alleged to have been suffered by the wrongful, careless and negligent deflection of the stream against the banks and shores bounding the property of the meat company.

The matter coming on to be heard upon a motion for a change of venue, the trial judge overruled the motion, whereupon counsel appearing in behalf of King county came to this court challenging the jurisdiction of the superior court and asking that a writ of prohibition issue restraining further proceedings. We granted an order to show cause why a writ should not issue, which, being met by demurrer and answer, raises the one and controlling question, *i. e.*, Can a municipal corporation be sued in any court other than a court situate within its own boundaries?

Petitioner argues, and upon well established authority, too, that, it being the rule at common law that a county could be sued only in an intraterritorial court, and there being no statute which in its terms either negatives or abolishes the common law rule, it follows that the court below is threatening to exceed its jurisdiction by holding King county to answer in the superior court for Pierce county. Counsel cite: *North Yakima v. Superior Court*, 4 Wash. 655, 30 Pac.

1053; *Piercy v. Johnson City,* 130 Tenn. 231, 169 S. W. 765, L. R. A. 1915 F 1029; *Heckscher v. Philadelphia,* 6 Sad. (Pa. Sup. Ct. Cas.) 346, 9 Atl. 281; *Parks Co. v. Decatur,* 138 Fed. 550; *Cullman County v. Blount County,* 160 Ala. 319, 49 South. 315; *Phillips v. Baltimore,* 110 Md. 431, 72 Atl. 902, 25 L. R. A. (N. S.) 711; *Shaver v. Lawrence County,* 44 Ark. 225; *Lehigh County v. Kleckner,* 5 Watts. & Serg. (Pa.) 181; *City Nat. Bank of Austin v. Presidio County,* 26 S. W. (Tex. Civ. App.) 775.

Counsel appeal strongly to the public policy which is made the groundstone of the common law rule—that is, that the duties of municipal officers being essentially local, they should not be put to the compulsion of attending upon trials distant from the seat of that government which they are under obligation to administer. It will be observed by those who have cause or sufficient interest to read the authorities cited that they naturally fall within two classes: (a) There was no statute fixing the venue of civil actions; or (b) the action was for an injury to person or personal property, and consequently personal, a situation analogous to our statutory provision permitting a defendant to compel the trial of a cause otherwise transitory in the county of his residence.

We feel called upon, therefore, to make reference only to *North Yakima v. Superior Court,* and this not without some embarrassment. The writer of the opinion, which was concurred in by two members of the court, two concurring in the result, after holding under the statute that the action had been brought in the wrong county, proceeds to discuss generally the common law rule of venue in actions against municipal corporations, and probably holds in line with the cases cited in the opinion, namely, that municipal

corporations "could only be sued outside of the county wherein they were situated by express legislative provision;" or, as he puts it,

"In other words it held that the general provisions authorizing such corporations to be sued do not change the rule which is found to exist at common law that the suits thus authorized to be brought must be waged in the county in which the corporations were situated."

It has been disputed whether an action could be maintained against a municipal corporation at common law for its torts; but however that may be, this action is maintained under a positive statute granting a right to maintain actions against municipal corporations.

"An action may be maintained against a county, or other of the public corporations mentioned or described in the preceding section, either upon a contract made by such county or other public corporation in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation." Rem. Code, § 951.

The legal effect of this section has been declared to be:

"Not only is provision made for an action against the county upon contract within the scope of its authority, but an injury to the right of the plaintiff arising from some act or omission of the county." *Kirtley v. Spokane County,* 20 Wash. 111, 54 Pac. 936.

Contrary to the inferences drawn by the majority of the court in the *Yakima* case, it seems to us that the effect of this statute is not merely to give a right of action where none existed before, but to make municipal corporations subject to suit as an ordinary party litigant and, as such, answerable under the general rules governing procedure in the superior courts.

It is a rule of construction that statutes providing remedies against either public or private wrongs are to be liberally construed. 36 Cyc. 1173.

"If a new right is created by statute and it is silent as to the mode of its enforcement, or as to the form of redress in case of invasion, then the proprietor of that right may resort to the common law or the existing general statutory procedure for remedial process." Lewis' Sutherland Statutory Construction (2d ed.), 572, citing many cases.

"If Harris had possessed a right, at the common law, to the exclusive enjoyment of this ferry, then, the statute giving a remedy in the affirmative, without a negative expressed or implied, for a matter authorized by the common law, he might, notwithstanding the statute, have his remedy by action at the common law. (1 Com. Dig. Action on Statute, C.) But Harris had no exclusive right at the common law, nor any right, but what he derived from the statute. Consequently, he can have no right, since the statute, but those it gives; and his remedy, therefore, must be under the statute." *Almy v. Harris*, 5 Johns. 175.

In some of the cases cited by the text writer, the courts gave remedy according to the common law. But in each instance, save one, there was no code of procedure, and the courts sat in what, for the want of a better term, we call common law states. But with us, we have no common law rules of procedure. Common law rights, like statutory rights, are enforced under the code of procedure, and not under the forms of the common law.

There is a wide distinction between common law rights and common law remedies. The one is an inheritance of blood; the other is no more than a means of preservation in which no rights are vested and no preferences preserved. By the adoption of the reformed procedure, we divorced ourselves from the one

while affirming the other. In the absence of statute law, the common law as we have it is a rule of decision. It is not a rule of practice.

To the extent of bringing the petitioner into court, respondent must have resorted to the procedure outlined in the code, for we admit neither the process nor the writs of the common law. We have neither *capias* nor attachment, declaration or plea. A summons must be issued under the statute to be answered in the time limited. If a judgment is entered it is satisfied by execution and not by *scire facias*. Shall we hold, then, although petitioner must be brought into court as an ordinary litigant, for

"There shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be called a civil action." Rem. Code, § 153;

and being mindful that the common law is preserved only when not inconsistent with the laws of this state (Rem. Code, § 143), that, although the suit must be begun and prosecuted under the code, yet its venue will nevertheless be determined by reference to the common law. If we were to attempt it the common law would block our effort quite as effectually as the statutes of venue, for

"In local actions, where possession of land is to be recovered, or damages for an actual trespass, or for waste, etc., affecting land, the plaintiff must lay his declaration or declare his injury to have happened in the very county and place that it really did happen." 3 Blackstone's Commentaries, 294.

And this was the rule in England under the common law, as confirmed by acts of parliament, until the passage of the judicature act of 1873.

Having then two common law rules, the one combating the other and with equal force, there is but one

thing to do; that is, to fix the venue of this suit, as we do all others, where the statute has fixed it, for the place of trial is purely a question of procedure. It involves no question of substantive law.

Neither a person nor a body corporate has a constitutional right to be sued at the place of domicile. This counsel will admit, but they contend that the common law procedure as to the place of trial must govern in the absence of a statute expressly authorizing a county to be sued beyond its own boundaries. But to us it seems the better rule that, having no procedure other than the practice act, a municipal corporation must answer under it, unless the act giving the right of action exempts it in terms. This it does not do.

"Actions for the following causes shall be commenced in the county in which the subject of the action, or some part thereof, is situated:

"(1) For the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or for the determination of all questions affecting the title or for any injuries to real property." Rem. Code, § 204.

McBane v. People ex rel. Stout, 50 Ill. 506, is quoted with approval in *Clarke v. Lyon County*, 8 Nev. 181:

"It will be observed that the language of this section is comprehensive, and embraces the parties to any civil suit. And it is obvious that an action against a county is a civil cause; and it is equally plain that the plaintiff and defendants are parties to it; and it follows that they are embraced within the provisions of this law, nor do we find any exceptions as to any class of persons or civil causes, and no reason is shown why such parties or causes are not as fully within the reason of the provisions of this law as other parties."

In *Mayor, etc. of Baltimore v. Meredith's Ford and Jarrettsville Turnpike Co.,* 104 Md. 351, 65 Atl. 35,

the question occurred, as is indicated by the contentions of counsel for the city:

"(1) A municipal corporation can be sued in its own courts only. (2) The Statute law of Maryland makes no provision for suits against a municipal corporation in any court other than its own. (3) There is nothing in the common law, as interpreted by the courts of Maryland, that is to be taken as a qualification of the rule that municipal corporations cannot be sued in courts, other than their own. The sole question thus presented, is whether a municipal corporation can be sued, in this form of action, in a court other than its own."

The action was one of trespass to real property, and the court held, without discussion of contrary authority, that the municipality must answer, saying:

"But it is earnestly urged upon the part of the appellant that the authorities cited and the reason for the rule stated have no application to the case at bar, because the statute law of the state makes no provision for such suits, and there is nothing in the rule of the common law, as interpreted by the courts, that can be taken as a qualification of the rule that municipal corporations cannot be sued in courts other than their own. We have been referred to no decision in this state that holds that a municipal corporation should not be bound by the rules of law which are applicable to other litigants, and no sound reason can be given why they should be excepted."

The law, being founded in reason, boasts as its first cardinal principle that, when the reason for the law ceases, the law itself ceases. *Cessante ratione legis cessat ipsa lex.* The rule of the common law was grounded in reason. It voiced a wise public policy. It fit the times; but to admit the rule as binding under present conditions is to make a fetich of authority and hold to the rule for no other reason than that it was originally so declared and is entitled to perpetual ven-

eration because it has been followed in one book after another. In these days of quick transportation, of mileage books, and office automobiles, it is putting no hardship on the officers of a municipality, or upon the municipality itself, to defend an action which by all other law is made local and ought by right to be determined at the place where the cause arises. To hold otherwise is to find a common law rule and administer it in obstinacy rather than in reason.

The action is local, and the county of King is therefore liable to answer in the county where the injury occurred.

The writ is denied.

FULLERTON, PARKER, MACKINTOSH, and TOLMAN, JJ., concur.

[No. 27. Department One. November 27, 1918.]

In the Matter of the Proceedings for the Disbarment of HOMER E. TURNER.[1]

ATTORNEY AND CLIENT (7)—SUSPENSION—GROUNDS. Although the relation of attorney and client did not exist, an attorney will be suspended for one year for acts involving moral turpitude, where money intrusted to him to be loaned at 3 per cent per month, was used by him for his own purposes, he paying interest for one month and finally admitting it had not been loaned, although later he repaid the whole sum.

Proceeding filed in the supreme court February 18, 1918, for the disbarment of an attorney, upon findings of the state board of law examiners. Judgment of suspension for one year.

The Attorney General and *R. M. Burgunder, Assistant,* for the state.

Edward Judd, for accused.

[1]Reported in 176 Pac. 332.

MACKINTOSH, J.—Homer E. Turner has been a member of the bar of this state for several years, practicing in King county. It is sought in this proceeding to disbar him on two charges involving moral turpitude. The first relates to the matter of fees received for the defense of two defendants charged with crime, but the evidence introduced in substantiation of this charge falls far short of satisfying us that there was any such misconduct as would justify his disbarment, even viewing the facts in the most unfavorable light to the accused.

The second charge is supported by evidence showing that Turner received the sum of $300 from a woman, who was not at the time, and never has been, his client, upon the express understanding that he was to loan it to city employees, so as to secure for her interest at the rate of three per cent per month, the whole amount of the principal to be returned to her at the end of three months. Her testimony shows that Turner paid her $10 at the end of the first month, which was more than the interest to which she was entitled; that in the succeeding months she received no interest, and that Turner finally admitted to her that he had never loaned the money, but had used it for himself. Thereafter he repaid the sum of $110, and prior to the hearing before the state board of law examiners had repaid the entire amount.

The record shows that Turner did not go upon the stand to explain this transaction. Although the relationship of attorney and client did not exist, and this money was entrusted to Turner without knowledge on the part of the complaining witness that Turner was an attorney at law, yet, in order to preserve the integrity of the profession, the necessity of discountenancing such misconduct compels us to discipline the attorney for this act involving moral turpitude.

We believe that, in view of these facts, Homer E. Turner should be suspended from the practice of the profession of law for the period of one year from the date of the filing of this decision. It is so ordered.

PARKER, TOLMAN, CHADWICK, and FULLERTON, JJ., concur.

[No. 14891. Department One. November 27, 1918.]

In the Matter of the Proceedings for the Disbarment of EDGAR G. MILLS.[1]

ATTORNEY AND CLIENT (7-1)—DISBARMENT — GROUNDS — CRIMINAL OFFENSES—BLACKMAIL. An attorney of mature years and long experience should be disbarred where it appears that, having been fully informed of, and having given advice as to, a blackmail scheme, he assisted therein by delivering the blackmailing message, having knowledge, or ample means of reading and acquiring knowledge, of its contents before delivery.

THREATS — BLACKMAIL — ACTS CONSTITUTING — ACCESSORIES. An attorney who advises as to and delivers papers intended to extort a settlement of a dispute and the purchase of stock through accusations of crime and threats of publication of alleged events and incidents of the recipient's life, having knowledge or reasonable grounds of belief as to, and full opportunity to ascertain, its contents before delivery, is guilty of blackmail, under Rem. Code, § 2613, including within the definition of blackmail an accusation of crime with intent to extort or gain any money or property or affect any cause of action or defense, and Id., § 2007, abolishing the distinction between an accessory before the fact and a principal and making aiders and abettors liable as principals.

Proceeding filed in the supreme court June 18, 1918, for the suspension of an attorney, upon findings of the state board of law examiners. Judgment of disbarment.

The Attorney General and *R. M. Burgunder, Assistant,* for the state, contended, among other things,

[1]Reported in 176 Pac. 556.

that a conviction of the offense of blackmail or of attempted extortion by threats is a conviction of a crime involving moral turpitude. *In re Hopkins,* 54 Wash. 569, 103 Pac. 805; *In re Coffey,* 123 Cal. 522, 56 Pac. 448; *People ex rel. Colorado Bar Ass'n v. Varnum,* 28 Colo. 349, 64 Pac. 202; *People v. Eichler,* 75 Hun. 26, 26 N. Y. Supp. 998; *Ex parte Mason,* 29 Ore. 18, 43 Pac. 651, 54 Am. St. 772; *In re Sherin,* 27 S. D. 232, 130 N. W. 761, Ann. Cas. 1913D 446; *In re Harrington,* 146 App. Div. 219, 130 N. Y. Supp. 920.

Edgar G. Mills, in person (*Charles E. Claypool* and *C. J. France,* of counsel), for accused.

TOLMAN, J.—On January 23, 1918, a complaint was filed with the secretary of the state board of law examiners charging Edgar G. Mills, a duly admitted attorney under the laws of this state, with unprofessional conduct as a member of the bar of this court, because of his action in connection with a certain attempt at blackmail.

It appears that one F. J. Richards, who had long been employed as the manager of the Thompson Hotel Company of Lincoln, Nebraska, had acquired certain stock in that company, partly paid for, upon his interest in which he fixed a value of $24,000. Mr. Thompson was the holder of a majority of the stock of the hotel company, and there appears to have been no market value for the minority stock. Mr. Richards, evidently desiring to sever his connection with the hotel company in order to take employment as business manager with one Dr. Dechmann, who operated a sanitarium on Lake Crescent, in Clallam county, this state, desired to dispose of his stock in the hotel company at what he considered its value, and conceived the idea that he could not do so to any

one other than Mr. Thompson. At the same time, Dr. Dechmann was having trouble with Mr. Thompson over certain water rights. Thompson had previously been a patient at Dechmann's sanitarium and taken treatment there. For a time he expressed himself as pleased with the treatment, and then appearing to become dissatisfied, left the sanitarium and went to his summer home adjacent, and laid claim to the water, which seems to have flowed through his property, which was used to supply the Dechmann sanitarium. Litigation arose over the water right between Dechmann and Thompson, and Mr. Mills was attorney for Dr. Dechmann in that litigation. Richards was interested in this litigation and in Thompson's attitude toward Dr. Dechmann and his sanitarium because of his plan of allying himself with Dr. Dechmann's interests, and he desired to settle the controversy over the water right in Dr. Dechmann's favor by obtaining a ninety-nine year lease of the Thompson property, and obtain a statement from Thompson with reference to Dr. Dechmann's ability and method of treating diseases, which would be of value in the future to both Dr. Dechmann and himself. Under these conditions, Mr. Mills proposed to Dr. Dechmann that he would go to Thompson, over the head of Thompson's attorney, and try to settle the dispute over the water right, and Dechmann advised him to wait a while as Richards had some plan for adjusting matters, and it would be well to consider that plan before anything else was done. The other material facts will hereafter appear.

The constitutional questions raised by the defendant are disposed of against his contentions in *In re Bruen*, 102 Wash. 472, 172 Pac. 1152, and need not be here considered. The other technical objections

and motions made by the defendant have been carefully considered, found not well taken, and, because of the length of this opinion, will not be further discussed.

The defendant in his brief says:

"You cannot convict or disbar unless it is shown that the acts were knowingly done, and the evidence is undisputed that Mills did not know the contents of the package and there is no finding that he did, and no evidence to that effect and no ground for an impartial mind to so conclude."

We quite agree with and adopt the legal conclusion that the acts must be shown to have been knowingly done in order to justify disbarment; but as to the evidence, we are reluctantly forced to take the opposite view. There was introduced in evidence two written statements, each signed by Edgar G. Mills (Exhibits 4 and 5), purporting to cover the facts in this case; and according to the testimony, each of such exhibits was carefully read and corrected by Mr. Mills before he affixed his signature. Exhibit 4 was made at the time of the institution of a criminal prosecution for blackmail against Richards, Dechmann and Mills, and exhibit 5 was made some months later after Richards and Dechmann had been tried on the charge and Mr. Mills had testified in both trials as to the facts within his knowledge. The two statements do not differ in effect, though exhibit 5 goes more into detail; and while it may unduly extend this opinion, yet to avoid the possibility of its being thought or said that any evidence has been torn from its context to alter or affect its convincing force, we feel obliged to quote exhibit 5 in full, which is as follows:

"In the Superior Court of the State of Washington
"in and for the County of Clallam.

"State of Washington, Plaintiff, v. "Frank J. Richards and "Louis Dechmann, Defendant.	Statement of Edgar G. Mills.

"November 23rd, 1916, by Mr. S. C. Rose:

"Q. Now, then, Mr. Mills if you will say—along the same line as your testimony in this proceeding of the state against Dechmann—when was the first conversation that you had with Dr. Dechmann that had anything to do with this Richards proposition? A. On or about the first part of June, 1916. Q. Then what was that? A. That was when I told the doctor that I was going to try and go over Trumbull's head and get a hold of Thompson and see if we could not settle up this water dispute and the doctor then said to me, 'Wait a while, Richards has some plan, let us see what that is and what he can do before you do anything.' Q. Did he say what the plan that Richards had would be calculated to do, or what Richards thought it would do, or what it would settle up? A. He said that Richards had some plan that he thought he could settle up everything. I then wrote Richards a letter about the Burkhardt title, and in that was a short paragraph in which I said the doctor said to me that you have said to him that you have some plan whereby you expect to effect a settlement of all of the doctor's trouble with Thompson. I said that conditions were getting into a bad shape as far as the doctor was concerned, that I had to make frequent trips to Port Angeles and Lake Crescent and that they were expensive and that something drastic would have to be done soon. I think I got a reply to that, I am not sure about it though, that he was going to be in Seattle before long; he made no reference to any plan, but that was the answer to that letter. He did answer in regard to the Burkhardt title. Q. Had you met Richards up to this time?

A. No, I had not. Q. Then what next was in connection with this thing? A. The next was when I was introduced to Richards at the Woman's Exchange in Seattle. Q. Tell us about that. A. I was at the woman's exchange, either attending some political meeting or getting my dinner, I think perhaps both— Q. About what date was that? A. That was the Saturday or Sunday, I do not remember which, if it was Saturday, it was the Saturday of the second week before the 20th of July. If it was Sunday, it was the week preceding the week including the 20th, anyway, Mr. and Mrs. Dechmann were there with Richards and two or three others who were strangers to me, I think Germans also, and I was introduced to Richards. Q. Is it true, as you have said before, that Dechmann first called you to one side? A. I was just getting to that. Q. Were you introduced to Richards first before Dechmann called you to one side? A. I was introduced to Richards at the table and shook hands with him. I had heard about him in 1915, because my older boy was at Lake Crescent, at Qui Si Sana, the same time as Richards was there. Q. And then what? A. Well, then, after I was introduced to Richards and they finished their dinner, the doctor called me to the other side to one of the side seats (they are arranged like Pullman tables) and said that Richards wanted a lawyer and that he wanted to throw the business to me so that I would get the fee, and said, 'He has some kind of statement that he wants to give Thompson,' and that they wanted me to blue-pencil it, and then he called Richards over. Q. Did he state to you why it should be blue penciled? A. The idea that I got was that he wanted it brought within the law of Blackmail. Q. Did he use the term of Blackmail? A. I think he did. I am sure about the blue penciling. Q. Are you sure he said blackmail or not? A. The word blackmail was used, I am sure that Richards used the word blackmail. Q. Did Dechmann use it before Richards was called over? A. I think he did. My recollection is that he did, I am sure that Richards did. Q. Was Dechmann there? A. Yes, Dechmann sat right there. The doctor sat over against the wall,

then Richards on the outside of the same seat, and I sat on the other side of the table. Richards wanted the laws of blackmail looked up under the laws of the state of Washington, the conversation was short there. Well, then, I went to work in my office Monday, Tuesday, Wednesday, Thursday, until Friday afternoon, looking up the law of blackmail as suggested by Richards, and I not only looked it up in regard to the laws of the state of Washington, but I went into the Encyclopedia of Law.

"Q. Did Dechmann, prior to the time that he called Richards into your conversation, did he before say to you in Richards' absence, while Richards was away, that Richards wanted you to look up the law of blackmail? A. My recollection is that he said that Richards was going to get up a statement and wanted me to blue-pencil it and bring it within the law of blackmail. Q. Then you were up to the point where you had looked up the law during several days—— A. Well, during the morning the doctor telephoned down and made an appointment for Friday of that week at 3 o'clock. I remember that because it is on a calendar that I have in my office. Q. That is, Doctor Dechmann called you up? A. Yes, and they came into my small office there. Q. By they you mean Richards and Dechmann? A. Yes, Richards was sitting right there at the end of my desk and Dechmann over at the corner by the bookcases. Richards had with him the eight or nine pages of typewritten stuff that is now incorporated in state's Exhibit A. Q. That was the first eight or nine pages, was it? A. Yes, now he may have rewrote it, but it is practically the same, I think probably verbatim. He had another paper, his 'Bully of Natches,' and he went on to tell how he was going to match that up with the Bully of Nebraska or Lincoln. Q. Did he make a statement of what he proposed to allege or say in his so-called Bully of Nebraska, that is, did he make a statement of what he was going to say about Thompson? A. He stated in detail just as I stated on the stand concerning the allegation of stealing his transportation coming from Michigan to Nebraska, and the lantern incident of beating the young

man, and then he took up the alleged history of Thompson's three marriages, and stated in regard to the difficulty in the apartment house at Lincoln, and involving the question of the impotency of Thompson with his third wife. Q. Have you since read this stuff, I mean any time since, the last few days, or at any time since, have you read the stuff that is in this Exhibit A? A. I heard it read by Mr. Trumbull and Mr. Rose. Q. Now, did he in substance state to you there in your consultation office what is incorporated in that Exhibit A under the heading of the 'Bully of Nebraska?' A. He told about the difficulty between Thompson and Dechmann and his complaints, and of the visit of the people from Nebraska, and the accusations of infidelity on the part of his third wife, and also took up the question of the present son of Thompson, resemblance to Thompson, vindicating the woman. I do not think that there was anything said about the alleged persecution of the kid. Q. Did he speak of this distribution of passes on the basis of the wives and daughters submitting to his sensual desires? A. Yes. Q. Did he take up the Central Bank of Lincoln, Nebraska? Did he say anything about that? A. Yes, I will tell you why I remember that. I have a client who met me on the street car, who said, 'I have a decision here that would be of interest to you,' and he handed me a typewritten decision of the United States Supreme Court that had been sent to him by an attorney named Jones in Nebraska, who had acted on the other side of this bank business? Q. That is this suit that involved Thompson? A. Yes, and I asked him to let me take it, and I took it up and showed it to Dechmann. This was before the 20th of July. Q. Was it before you had met Richards? A. Yes, it was before I ever met Richards. Q. Then the alleged blackmail of Occult and Mosier, did he mention that? A. Yes, these were propositions that he proposed to put in. He was discussing using them. Q. And that would be the case if he used them? A. Yes, and that was the dope that he was figuring on using. Q. Well, then, this allegation referring to the seduction of the girl in Brazil? A. Yes, he had the thing down from A to Z,

as he has it in Exhibit A. Q. Well, at the time he was discussing making these statements, and you and he were considering the thing, and he submitted these eight or nine sheets to you, was Dr. Dechmann present all the time? A. He was in and out. Q. Would you say that he was there most of the time? A. I should think a good deal of the time, what he did out I do not know, but as I testified, I telephoned to him that I wanted to talk to him before I talked with Richards, but he did not do that. Q. Then, if I understand you right, first Dechmann phoned you and made the appointment, and a little later you phoned Dechmann and asked him to come down first so that you could see him before you talked with Richards? A. Yes, but when he did come on Friday, Richards was with him. Q. Then he did not come alone; he came with Richards? A. No, he came with Richards. A little later, I think this was before I entered into the conversation with Richards, I called him out and said that I wanted him to keep out of it; he did not say anything, but he gave me one of those knowing looks and nods, as though he was on. Q. Then did he come back into the office with you? A. Yes, and was in and out, most of the time he was in there. Q. Did he make any remark that indicated that he heard what Richards was saying? A. As I recall, the only remark he made—he was horrified that some of the things that Richards alleged against Thompson having been done.

"Q. Now, what advice, if any, did you give them as to this proposition? A. I read them first the statute on the law of blackmail, and also read them the statute on the law of extortion, comparing the difference between the two, and I read a lot of decisions I had, just what ones I do not remember, my desk was piled up a couple of feet deep, that is my way of briefing a case as I find one case I lay it open on my desk. Q. So that you have just kind of an endless chain? A. Yes, I never finish a brief. I told them that the law of blackmail under our statutes was very strict, and that to put up the accusations, or in brief, the article that he had suggested, as a sort of history of Thompson's life, accompanied with threats, would be blackmail.

Here is something further that I said to him. I said, 'Is this the first difference you have had with Thompson?' And he said it was, he said it was the first suggestion that he ever intended to quit Thompson; and I said, 'It is just like a stroke of lightning;' and he said it would be; and I said, 'Now here is a man who has been ambassador to Brazil, ambassador to Mexico, president of a railway, a multi-millionaire, a man full of experience,' and I said, 'Have you any idea that you could pull off anything like you suggest and get away with it?' and he said, 'I think I know my man.' Q. Was it at that time that you started to prepare the form of lease that is Exhibit F? A. Yes, that lease was started to be prepared. They came late and we talked a long while, and the girl had gone, and I was not used to using the machine, and I got it all balled up, so we drew it up again the next day. Q. Where did you get the description? A. From my files on the water case. Q. Did Dechmann know that you were drawing up that lease? A. Yes, he knew that. Q. Did he know the purpose of it? A. I do not know. I advised them against the threats, and when they left there there was no decision made and I thought he would follow my advice, if he wouldn't, what did he get it for; but as things look now, he never intended to follow it. Q. Did you at that time, as insinuated by Mr. Israel, advise them to the effect that if a man makes threats in order to obtain something that he honestly believes is rightfully his, that it would not amount to blackmail? A. If I did it came through some authority that I read. I know I would not advise him of that. But after he testified that I told him that, I testified that probably I did read it, but my impression was that he had been advised on the law of blackmail in Nebraska, and wanted me to look up especially the law of blackmail in Washington. Q. But you have no recollection of advising him as to his obtaining a thing rightfully his? A. No, in the first place, a thing of that kind would be inapplicable to the thing that he presented to me, because there was so many of them that were entirely foreign to any demands that he might make on Thompson or any busi-

ness connection with Thompson. Q. Did he then outline the things that he proposed to demand, that is the $24,000 for his stock as set forth in this Exhibit A and the 99-year lease, and the letter that follows? A. The stock, of course, was mentioned in the pages that was submitted to me. Q. I guess all of those things were outlined in those pages, the three demands; if you had those nine pages you had them all. Now, Mr. Mills, I hand you this copy which I have of Exhibit A and ask you if, as a matter of fact, those three demands there set up in those first nine pages were in those submitted to you, or, that is, if they are in substance what was submitted to you? A. Yes, these are in substance the same nine pages that I saw. Q. And those three demands were in your mind as a part of their purpose when you advised them? A. Yes, it was those that I told them that if connected with threats that he suggested, Thompson's biography, as he called it, would constitute blackmail. Q. Then in drawing up this lease you were drawing the lease in accordance with the second demand? A. At the same time they were considering these he asked me to draw up a lease and I took the description from the files I had in the water suit of Thompson v. Dechmann. Q. Then that form of lease that you started to draw was a lease of the Thompson property on Lake Crescent? A. Yes. Q. Then when after that meeting did you next see Dechmann and Richards? A. I saw Richards the next morning; some time in the forenoon he came in and had the stenographer draw up the lease. Q. Were you present? A. Yes, I was present. Q. And supervised the drawing up of the lease? A. I just simply gave her the interlined and balled up copy that I had drawn up the day before, and she drew it up and put it on my desk. Q. Did you have any conversation at that time with him, this time when your stenographer made out the lease, did you have any conversation with Richards as to this general proposition? A. Nothing at all; he simply got the lease and went away.

"Q. When was the next time that you met either Richards or Dechmann? A. The next Sunday night

at the Butler hotel. Q. Just tell us how you happened to meet and what occurred? A. I told Richards that I was going to Port Angeles on the Burkhardt title. Q. When did you tell Richards that? A. I think I told him that on Friday the—— Q. The day the lease was made or the day that you had this general consultation? A. Friday was the day that I had the general consultation with them; the lease was started that day. Q. Now, will you answer again, Mr. Mills, the question that I asked you as to when it was that you told Richards that you were going over to Port Angeles on the Burkhardt title? A. That was on Friday, the first and only consultation that I had on this matter. Q. Well, just proceed. A. I told him also that Tuesday was the day set to take up the injunction suit that Dechmann had brought to restrain Thompson and Trumbull from blowing up the dam, and it was agreed that I should meet them at the Butler hotel on Sunday evening at about 10 o'clock, as he was going to Portland that same night that I was going to Port Angeles. Q. When you told them on that Friday of this consultation that you were going to Port Angeles and the appointment was made, then was there any express purpose in having that meeting? A. No, that was just incidental, that we were both going away about the same time. The only talk about the delivery of the papers to Thompson occurred there at the Butler hotel. It was very brief and hurriedly, as we had not touched on that until after we had gotten well along with a hasty meal. He had called me up and paged me at the hotel that the automobile was broken down and that they would be delayed, and they did not get there until nearly 11 o'clock (my recollection is that it was nearer to half past 11 than it was 11), and the meal that we had was light stuff to correspond with the time we had to eat it, and Richards and I did not get half way through with what we were eating until we had to go to the train and the boat. Q. You say they came—who came? A. Richards and Dechmann and Mrs. Dechmann and Miss Schuetz. Q. Did you sit at the same table? A. Yes, at the same table.

Q. And what conversation took place there with regard to this document? A. No conversation about the document, except Miss Schuetz said how hard she had been working all day Sunday and Sunday night and that she just got the papers concluded before they started, and how tired she was, and then the next conversation was just a minute before we started to go away, and the doctor suggested that Hans might deliver the papers, and I said that I did not want any of the Dechmanns to have anything to do with this because if I ever do have a settlement with Thompson this might aggravate it. Then I got up, and the papers, the two packages, were handed to me. I had my grip in one hand and my coat in the other hand. Q. What did you say, if anything, as to your doing it? A. Will you wait? I reached over and the packages were handed to me. Q. By whom, if you remember? A. My recollection is by Richards. I said, 'Now I do not know what is in this, and I do not want to know, and I won't know. I am simply going to act as a messenger boy, and if I cannot arrange conveniently to have some one deliver them at the time Richards wants them, I will see to it that they are delivered myself.' Q. How were these two packages marked? A. One was marked 'Hon. D. E. Thompson, Lake Crescent, Washington,' on the outside wrapper. I know that there were two wrappers, because the outside wrapper became untied, it was tied with a string, and I saw that there was a lighter paper wrapper, and my recollection is that the other one was done up in the same way and marked with a lead pencil, either 'Doctor D.' or 'Dr. Dechmann,' as to what I was to do with the extra copy there was nothing said, as I had to rush to catch the boat, and just got on as the gang plank was drawn up. Q. Richards told me yesterday—and I just want to ask you if it is true—that you asked for the second copy because you wanted to read it, and that Dr. Dechmann's copy was given to you to read? A. He testified on the stand that he gave me this copy marked 'Dr. Dechmann' to read over by me before I served the paper; there was nothing of that kind said, and there was absolutely no strings at

all upon the delivery of the package to Thompson, because if I had ever read it I would not have delivered it, and he wanted it delivered at a certain hour on a certain day, as that would be about the same time that he would arrive in Lincoln, and if I had ever read it over I would not have delivered it, and that would have balled him up. Q. Were you given any instructions as to notifying Richards when you had made the delivery? A. Richards asked me that as soon as I delivered it to Mr. Thompson, to wire him, which I did.

"Q. Now, was all of this conversation that you have just spoken of between you and Richards, touching the delivery of the package to Thompson and the wiring to Richards, in the presence and hearing of Dechmann? A. It was in the presence and hearing of Dechmann, Mrs. Dechmann and Miss Schuetz and myself. Q. Was it all while you were grouped about the table? A. Yes, when we left the table he went one way to the train and I the other to the boat. Q. That is, he went to the train and you to the boat? A. Yes. Q. Then did you deliver the package to Thompson? A. I did. I went to Thompson's wharf on the morning of the 20th of July. I told Hans to get out his launch. Q. Where were you stopping? A. At Qui Si Sana. I had been there a couple of days, and inspected the spring and waterworks and interviewed some witnesses in regard to the community interests of the Burkhardts and the injunction suit against Thompson and Trumbull. Q. Who else, if any, of the Dechmanns were at Qui Si Sana at any time during the couple of days that you say you were there? A. A married daughter, Mrs. Abernethy, with her two children and the other two girls and the three boys. Q. Including, of course, Hans, of whom you have spoken? A. Yes. Q. Then Hans drove the launch over to the Thompson dock? A. Yes, we swung around and I threw the package over on the wharf. Thompson was there carrying his boy, and I said, 'Here is a package that Richards wanted me to deliver to you personally.' He invited me to come in and asked me if I would not like to look over the grounds, and I told him that I might come back later in the

day, and then I went down and wired to Richards at Lincoln, Nebraska, 'Papers delivered personally to Thompson, at 9 o'clock this morning at Lake Crescent,' and signed it. Q. Now, when you say that you wired and signed it you mean that you telephoned this in? A. Yes, I telephoned from Qui Si Sana to Fairholm, and asked the operator to get that wire off and he said that he would do the best he could. Q. Do you understand that there is a telegraph office there, or that he was to relay it by telephone? A. I understood that he was to relay it by phone. Q. Then you came back to Seattle with this copy of Dr. Dechmann's in your possession? A. Yes. Q. Then what did you do with Dr. Dechmann's copy? A. I had it in my suit case and took it to Duwamish Valley at Foster, where my wife had rented a summer cottage for a couple of months, and then we had it there for about a week, when I think the second Sunday I opened it up and my wife and I read parts of it. It remained there at Foster in that cottage until about the latter part of August, during the meantime, on the 21st of August we moved to a cottage at Alki Point in Seattle and we only had our personal belongings at Foster, and Mrs. Mills moved them up at different times in a couple of suit cases. During the meantime Miss Schuetz, the doctor's secretary, had phoned me that the doctor wanted this copy. Q. How many times do you think she phoned you? A. The doctor was going through Seattle from Lake Crescent to Portland and back again, and she asked me at least three or four times, as the doctor was very anxious to get this copy and was somewhat provoked because I had not gotten it. When it was brought up by Mrs. Mills I took it to the office and the wrappers had been destroyed or lost, so I rolled it up in one of my envelopes, and at Miss Schuetz' request mailed it to Dr. Dechmann at Lake Crescent, as he had just gone through from Portland to Lake Crescent, where his family was stopping. Q. About what date was that? A. The latter part of August; the rest of the time the copy was in the possession of Dechmann's attorney, Mr. Israel. Q. That was the same copy? A. The same copy, it was said

to be the same copy, and I never saw any other that I know of. Q. Did Miss Schuetz or Richards or Dechmann, or any one of these three, ever make any statement to you as to how or under what circumstances and by whom this stuff was composed or dictated? A. The only statements that were made was at the Butler hotel by Miss Schuetz that she had been working on it and how hard she had been working and that she was tired and had been taking dictation. Q. Did she say from whom? A. From Richards. Q. Did she ever say that Dechmann had dictated any part of it? A. No, she was very strict about that. Q. Did you ever have any other conversations about this with any of them? A. No, although we do live right across the street from Dechmann, we were then living temporarily at Foster, and Alki Point.

"(Signed) Edgar G. Mills."

"State of Washington, } ss.
"County of King. }

"I, Edgar G. Mills, being first duly sworn, on oath say: That I am the same Edgar G. Mills referred to in the foregoing statement and who made the answers to the questions propounded to me by Mr. S. C. Rose, prosecuting attorney of Clallam county, Washington, and that the answers contained in said statement were made by me as therein contained to such questions propounded by Mr. Rose; that I made such answers freely and voluntarily and of my own will. That I have read carefully said statement as herein contained and the whole thereof, and each of the questions with answers thereto as the same is contained in the annexed statement, and that the said answers are true answers to the questions propounded, respectively, and that said statement as a whole constitutes a true statement of the facts, matters and things therein referred to.

"(Signed) Edgar G. Mills.

"Subscribed and sworn to before me this 5th day of January, A. D. 1917.

"(Signed) J. William Hoar,
"Notary Public in and for the State of Washington, residing at Seattle.
"(Notarial Seal.)"

In addition to these signed statements, there is testimony in the record to the effect that Mr. Mills told the witness Trumbull, at a time when the package referred to was in his possession and still undelivered, that he was on his way to the lake to try to make a settlement with Thompson, and that, shortly after the delivery of the package to Thompson, Mr. Mills told Mrs. Ovington that, at the time he so delivered the package, Thompson invited him to disembark from his boat and look over the grounds, and he declined this invitation because he had delivered papers that Mr. Thompson would not like, and it would not be good etiquette to accept his hospitality at that time.

That the true facts are to be drawn from this evidence is shown by the statement of defendant's counsel at the close of the complainant's case:

"I will say that I have availed myself of the time so graciously given me by the board to go through the matters introduced in evidence, and it is my opinion, and I so advised Mr. Mills, we had nothing to enlighten the board on at all. The matters are all here in evidence. I do not think anything Mr. Mills may say would shed any light upon this phase of this unfortunate source (course) of events. We have nothing to introduce."

What are the true facts applicable to the points in issue? It seems clear to us that Mr. Mills knew before he ever met Mr. Richards that Richards had some plan for obtaining a settlement with Thompson outside of the courts (Richards not being a lawyer), which he and Dr. Dechmann thought would be more effective than legal procedure; that Mr. Mills became aware of the nature of this plan when he met Dr. Dechmann and Richards at the Women's Exchange in Seattle, and was informed that he was to look up the law of blackmail, and was to examine and blue-pencil a state-

ment prepared by Richards, so that the penalty of the criminal law might be escaped; that Mr. Mills did examine the law of blackmail and extortion for the sole purpose indicated, and that, after he had done so, Richards submitted to him the proposed statement, partly written and the remainder oral, so that he (Mills) was fully advised of the charges which Richards contemplated making. "He had the thing down from 'A' to 'Z'," as he has it in Exhibit "A"; that Mills advised that the law of blackmail was very strict, and that to threaten to publish the proposed statement or history of Thompson's life, unless his demands, which were then known to Mr. Mills, for money and property were complied with, would constitute the crime of blackmail under the law of this state. Mr. Mills advised against the contemplated proceeding, and appears to have specially warned Dr. Dechmann to have nothing to do with it, and to have said to Richards: "Have you any idea you can pull off anything like you suggest and get away with it?" To which Richards replied: "I think I know my man." At the same meeting Mr. Mills started the preparation of the lease, the execution of which was afterwards demanded of Thompson, and an engagement was made to take dinner together on Sunday, two days later, at the Butler hotel. When Richards and Dechmann left Mr. Mills' office on that occasion there was no decision announced as to a future course of action. The same parties, with others, met at dinner on Sunday night, according to appointment, and Richards then produced two packages of papers. The stenographer, who was one of the party, told how hard she had worked all day to complete the documents, and Dr. Dechmann suggested that his son might deliver the package,

which was addressed to Thompson, to which Mr. Mills objected, saying:

"I do not want any of the Dechmanns to have anything to do with this, because if I ever do have a settlement with Thompson, this might aggravate it."

Then Mr. Mills reached over and received the two packages from Richards, and said:

"Now I do not know what is in this, and I do not want to know, and I won't know. I am simply going to act as a messenger boy . . ."

If ever there was a self-serving declaration made, this on its face, in the light of the attendant circumstances, was one. If Mr. Mills had for one moment believed that the purpose to blackmail had been abandoned, would he not have inquired as to the contents of the package and sought to know what of the filthy charges which had been minutely detailed to him had been eliminated? Would he have warned the Dechmanns to keep out of it? Would he have made the elaborate self-serving declaration of lack of knowledge? What innocent man, engaged in an innocent undertaking, would think of proclaiming such a lack of knowledge, and such an intention to remain ignorant? We think the utmost of human credulity could not justify the answer to these questions for which Mr. Mills contends, and that a preponderance of the evidence establishes the fact that Mr. Mills accepted the package and agreed to, and did, deliver it to Mr. Thompson, well knowing what the contents were. That this is so is further evidenced by the fact that the second package containing the duplicate of the papers, afterwards given to Thompson, was addressed to Dr. Dechmann, and though Dechmann was actually there present, it was not delivered to him, but to Mr. Mills, with the evident purpose that he, Mills, might, if he cared to,

read and examine the contents before he delivered the original, as well as by the statements made to the witnesses Trumbull and Ovington, hereinbefore referred to. In the package delivered by Mr. Mills to Mr. Thompson, referred to as Exhibit "A" in the criminal trials, and introduced in evidence here as Exhibit 2, appears the following as a part of Richards' demand upon Thompson:

"I am going to be in Lincoln by Friday, July 21st, and if on that day I do not receive through Mr. Mullen, payment in full for my stock as outlined heretofore, and the assurance from you by wire that papers sent you for signature, are on the way, I will withdraw my offer of settlement and proceed to vindicate Dr. Dechmann by the publishing of the article enclosed herewith, which will go to press on Saturday, the 22nd, and be mailed out all over the world not later than the following Monday."

That Mr. Mills had knowledge of this demand in substance, as well as of the contents of the package generally, is further conclusively established by the care taken by Mr. Mills to deliver the package to Thompson at the exact day and hour directed by Richards, and thereafter immediately telegraphing Richards that the delivery had been made at the appointed time. No argument is necessary to convince the unbiased that a mere messenger boy, without knowledge of the contents of the package and the purpose sought to be accomplished, would have taken the pains and trouble necessary to relay a telegram by telephone with any such particularity. While we would most gladly have found otherwise, if the facts would have warranted, and have thus avoided the stern duty which now is before us, yet, under the undisputed evidence in this record, we must find that the defendant's statement, as a whole, over-rides his self-serving declaration of

lack of knowledge, and that he has been guilty of a crime involving moral turpitude under our criminal code, Remington's Code, §§ 2613, 2007, which read as follows:

"Sec. 2613. Blackmail.—Every person who, with intent thereby to extort or gain any money or other property or to compel or induce another to make, subscribe, execute, alter or destroy any valuable security or instrument or writing affecting or intending to affect any cause of action or defense, or any property, or to influence the action of any public officer, or to do or abet or procure any illegal or wrongful act, shall threaten directly or indirectly—

"(1) To accuse any person of a crime; or

"(2) To do any injury to any person or to any property; or

"(3) To publish or connive at publishing any libel; or

"(4) To expose or impute to any person any deformity or disgrace; or

"(5) To expose any secret.

Shall be punished by imprisonment in the state penitentiary for not more than five years or by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both fine and imprisonment."

"Sec. 2007. Distinctions Relating to Accessory Abolished.—No distinction shall exist between an accessory before the fact and a principal, or between principals in the first and second degree, and all persons concerned in the commission of an offense, whether they directly counsel the act constituting the offense, or counsel, aid and abet its commission, though not present, shall hereafter be indicted, tried and punished as principals."

In one thing we agree with the defendant: In his brief, referring to the recommendation of suspension made by the state board of law examiners, he says:

"A suspension of one year can have no more effect on his business than has already been produced by this

case. Defendant asks no such clemency as appears to be suggested by this board. Mills either knew the contents of the packages or did not know. If it is proven under the evidence that he knew, disbar him permanently."

Mr. Mills is a man of mature years, with a long experience as a practicing attorney. Youth, inexperience, sudden temptation, and like excuses do not apply, as he himself has said. And, upon the evidence, it becomes our duty to direct that he be permanently disbarred and his name stricken from the rolls.

It is so ordered.

FULLERTON, CHADWICK, PARKER, and MACKINTOSH, JJ., concur.

[No. 14688. *En Banc.* November 27, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. EDWIN RIPLEY *et al.*, *Appellants*.[1]

STATUTES (74)—CONSTRUCTION—PROVISOS. While the purpose of a proviso is to restrain, and not broaden an act, it may be considered in arriving at the legislative intent.

FISH (18)—OFFENSES — UNLAWFUL POSSESSION OF CRABS—STATUTES. The possession of crabs, in cold storage, either for the purpose of sale during the closed season or later, is unlawful after July 5, under Rem. Code, § 5150-101, making it unlawful to have possession of crabs for the purpose of sale during the months of July, August and September, with the proviso that it shall be lawful to have in possession crabs caught in June until the 5th day of July (FULLERTON and CHADWICK, JJ., dissenting).

Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 3, 1917, upon a trial and conviction of having possession of crabs during the closed season. Affirmed.

[1]Reported in 176 Pac. 343.

Byers & Byers, for appellants.

Alfred H. Lundin and *Frank P. Helsell,* for respondent.

TOLMAN, J.—The appellants were charged by the prosecuting attorney of King county, Washington, with the crime of having in their possession, for the purpose of selling the same, 718 dozen crabs taken from the waters of the state of Washington. It was charged that the appellants had these crabs in their possession on the 27th day of August, 1917.

The information was based upon § 5150-101, Rem. Code, which reads as follows:

"It shall be unlawful for any person, firm or corporation to take or have in their possession for the purpose of selling or canning any female or any male crab measuring less than six and one-half inches across its back or to take or fish from any of the waters of the state or have in its possession after the same has been taken, for the purpose of selling or canning any crab, during the months of July, August and September of each year: Provided, that any such person who has a crab in his possession caught during the month of June may retain the same in his possession lawfully until the fifth day of July thereafter: . . ."

The appellant interposed a demurrer to the information, which being overruled, the case was tried to a jury and a verdict of guilty was rendered, upon which a judgment was duly entered, and the appellants prosecute this appeal therefrom, assiguing as error the overruling of the demurrer, the rejection of offered evidence, and the giving and refusal of instructions.

The facts, regarding which there is little conflict, are substantially as follows: The Ripley Fish Company is a corporation organized under the laws of this

state, doing a general wholesale fish business in the city of Seattle. During the months of July, August and September, 1917, that company had stored in the cold storage warehouse of the Diamond Ice and Storage Company, in Seattle, 718 dozen crabs, which were delivered by it to the storage company in various parcels, beginning April 24, 1917, and continuing up to June 20, 1917. During the summer, beginning with June 25, some of these crabs were withdrawn and sold; some prior to the 5th day of July, which were taken indiscriminately from the place of storage without reference to whether they had been placed there in June or prior months. After July 5, two boxes were withdrawn on July 7. On August 14, one dozen crabs were withdrawn, and on the 16th, two dozen crabs, and on the 17th, two dozen crabs. On August 20, one box and one-half dozen crabs. On August 22, one box, and on August 24, one-half dozen crabs were withdrawn. Except as so withdrawn, all of the crabs remained in storage throughout July, August, and September.

The appellants contend that the statute should be so construed as to make it read as follows:

"It shall be unlawful for any person, firm or corporation to have in their possession for the purpose of selling or canning, any crabs taken from the waters of the state of Washington during the months of July, August and September of each year."

And the errors assigned are practically all based upon the failure of the trial court to so construe the statute, sustain the demurrer, and instruct the jury accordingly.

The appellants rely upon the case of *State v. Eden*, 92 Wash. 1, 158 Pac. 967, 159 Pac. 700, wherein this court construed the initiative prohibition law (Laws 1915, p. 2; Rem. Code, § 6262-1 *et seq.*), and held that

a private citizen, whose use of liquor was in nowise prohibited, might, under that decision, retain in his possession a greater quantity of liquor than that permitted by the act, provided that he came lawfully into the possession of it prior to the taking effect of the act, notwithstanding section 28 (Id., § 6262-28), which provides for the disposal of surplus stocks of liquor within ten days, and section 23 (Id., § 6262-23) which provides that possession of an excess shall be *prima facie* evidence that the liquor was kept for purposes of unlawful sale; the court holding that section 22 (Id., § 6262-22), which limits the amount of liquor one may lawfully possess, relates only to the unlawful possession of liquor acquired after the act became effective, and that there is no express provision in the statute making unlawful the keeping of liquors lawfully obtained.

We do not see any great similarity between the two acts. The provision in the prohibition act with reference to the disposition of surplus liquors could hardly apply to the individual holding liquor for his own use, because he could not lawfully sell the same without procuring a government and local license, and to ship it out of the state under such conditions would be idle. He must either keep it or destroy it. And the law, by its terms, does not require him to destroy it. Moreover, we are not in this case concerned with the mere private use, because the statute under which this prosecution was brought expressly provides that one may take crabs for consumption by himself, his family, or guests, at all times. And appellants are not contending that they were holding 718 dozen crabs for such a purpose.

Were it not for the proviso in the act, the construction for which the appellant contends might be con-

sidered upon the authority of *State v. McGuire,* 24 Ore. 366, 33 Pac. 666, 21 L. R. A. 478, where an act of like wording, except the proviso, was held not to make unlawful the possession of fish during the closed season, though there is a great, and, we think, irreconcilable, conflict in the decisions of the various states upon like statutes. Indiana, Kentucky, California, Georgia, Illinois, Massachusetts, Michigan, New York, and even Oregon, in later cases (*State v. Schuman,* 36 Ore. 16, 58 Pac. 661, 78 Am. St. 754, 47 L. R. A. 153, and *State v. Pulos,* 64 Ore. 92, 129 Pac. 128) have construed similar statutes without the proviso to mean that the possession during the closed season is forbidden.

While the purpose of a proviso is, and has been frequently held by this court to be, to restrain, modify or make an exception to something in the body of the act to which it is attached, and not to broaden the act proper, or to enlarge or extend its scope, yet we see no reason why a proviso may not be considered in arriving at the legislative intent. And in this act the legislature would certainly not have added the proviso permitting the possession during the first five days of July, of crabs caught in the month of June, unless it had intended by the body of the act to forbid all such possession during the closed season. Otherwise the proviso would have no force. If, then, the act is construed as a whole so as to give force and effect to the proviso, as well as to the body of the act, the legislative intent seems clear and unmistakable, and no doubt included the limiting of the taking of crabs to the number which could be disposed of or consumed before July 5th in each year, so as to conserve and perhaps increase the supply; as well as the simplifying of prosecutions for violations of the act

by taking away a possible wrongful use of the defense of lawful possession during the closed season; and perhaps, also, the protection of the public health, which might be believed to be endangered by the marketing of cold storage crabs during the hot weather period.

After a careful and most painstaking investigation of the various authorities, we are convinced that the legislature intended the act to be construed according to its plain and ordinary meaning, and so as to give force to the whole act, including the proviso. And as the appellants were in possession, during the closed season, of a large quantity of crabs, contrary to the plain letter of the statute, without any purpose of home consumption, but with the admitted purpose of selling the same, either during the closed season or later, it follows that the court did not err in overruling the demurrer, or in the instructions given.

We find no error in the rejection of evidence.

The judgment is affirmed.

MAIN, C. J., PARKER, MITCHELL, MOUNT, and HOLCOMB, JJ., concur.

MACKINTOSH, J., took no part.

FULLERTON, J. (dissenting) — The statute under which the appellants were convicted reads in full as follows:

"It shall be unlawful for any person, firm or corporation to take or have in their possession for the purpose of selling or canning any female or any male crab measuring less than six and one-half inches across its back or to take or fish from any of the waters of the state or have in its possession after the same has been taken, for the purpose of selling or canning any crab, during the months of July, August and September of each year: Provided, that any such

person who has a crab in his possession caught during the month of June may retain the same in his possession lawfully until the fifth day of July thereafter: Provided, that nothing in this section shall prevent the taking of crabs for the consumption of the taker or his family or guests, at all times without a license, and it shall be unlawful for any person, firm or corporation to take or catch any crabs with beam trawl or drag seine." Rem. Code, § 5150-101.

The majority construe this statute to mean that it is unlawful merely to have in possession crabs during the months named as a closed season. I cannot so read it. To do so, it seems to me, is to eliminate the qualifying phrase "for the purpose of sale or canning." In other words, the statute, as I read it, does not prohibit the mere possession of crabs during the closed season, but makes it an offense to have them in possession for the purpose of sale or canning during that period. That mere possession of crabs during the closed season is not unlawful is shown by the second proviso, since under it one may have crabs in his possession for his individual use during that period. Nor is the possession unlawful because the possessor may intend to sell or can them after the closed season is over. The prohibition is against possession for the purpose of selling or canning during that period. The statute is punitory, and its words should not be extended beyond their natural or obvious meaning.

I am aware that these qualifying words are not given effect by the majority because of the first of the provisos attached to the statute. But this is not the office of a proviso.

"A proviso attached to a statute is not a part of, but a restraint upon, an exception to, or a modification of some word or phrase of an act. Sutherland, Stat.

Constr. 222; Black, Interpretation of Laws, 270; *The Matter of Webb,* 24 How. Pr. 247. In other words, a proviso or an exception to a general statute involving no uncertainty and doubt cannot be held, nor can words be selected therefrom, to add to the declaration of the subject-matter expressed in the body of the act." *Tsutakawa v. Kumamoto,* 53 Wash. 231, 101 Pac. 869, 102 Pac. 766.

" 'The office of a proviso is not to enlarge or extend the act or section of which it is a part, but rather to put a limitation and a restraint upon the language which the lawmaker has employed'." *Laidlaw v. Portland, Vancouver, etc. R. Co.,* 42 Wash. 292, 84 Pac. 855.

"It is argued that the proviso in this section broadens this evident limited meaning of the language preceding in the body of the section, because there is in the proviso the words 'any public street, road or highway in this state.' Viewed superficially, this may seem a plausible argument, but its force is broken when we are reminded that the purpose of a proviso is not to broaden the meaning of language found in the main body of the act, but rather to limit the meaning of such language or except from its operation some specified objects or things." *Bartlett v. Lanphier,* 94 Wash. 354, 162 Pac. 532.

"A constitutional or statutory proviso is a restraint or limitation upon, not an addition to, that which precedes it." *State v. Collins,* 94 Wash. 310, 162 Pac. 556.

"A proviso repugnant to the enacting part of a statute is void, . . ." *State ex rel. Board of Tax Com'rs v. Cameron,* 90 Wash. 407, 156 Pac. 537.

Seemingly, the majority rule also that, while a proviso may not in itself modify, change or eliminate any part of the body of the act, it may be considered to gather the legislative intent, and if in considering it the intent appears to be something different from that which the words express, the words may be eliminated

to give effect to the intent. This seems to me unsound. Clearly it is as much to let the proviso control the substantive part of the act, if we read out qualifying words by reason of legislative intent gathered from the proviso, as it is to read them out because of direct contradictory provisions contained therein.

I do not know that I understand the reference made to the authorities cited in the majority opinion. If it is meant to be said that the courts from the states cited sustain the contention that a statute making it a criminal offense to have in possession fish or game during a closed season is constitutional and enforcible, I agree with the contention, and agree also that the courts of the states referred to so hold. But if it is meant to be asserted that these courts hold that a statute making it an offense to have in possession for the purpose of sale fish or game during the closed season is to be construed as making it an offense to have such game or fish in possession merely during that season, I cannot agree with the assertion. I can find none which so hold, and assuredly those to which specific reference is made do not do so. In *State v. Schuman,* 36 Ore. 16, 58 Pac. 661, 78 Am. St. 754, 47 L. R. A. 153, the question was whether a statute making it an offense "to sell, offer for sale, or have in possession for the purpose of sale, any trout at any time," was violated by offering for sale trout caught in another state and brought into the state whose statutes contained the prohibition. It was held that it was, but the court did not, even by an *obiter* declaration, say that, under the statute, it was an offense merely to have trout in possession. In *State v. Pulos,* 64 Ore. 92, 129 Pac. 128, the statute made it unlawful in certain counties, at any time between January 15 and September 1 of any year, to have in possession

any wild duck, and it was held an offense to have in possession any such duck in the closed season, although killed during the open season. I concede this case to be rightly decided, but it is far from holding that a statute which prohibits the possession of game for the purpose of sale during a closed season is violated by merely having such game in possession during the closed season.

I may add that my construction of the statute was the primary view of the prosecuting attorney, who conducted the prosecution of the appellants. He not only, in his information, charged the appellants with the possession of crabs during the closed season "for the purposes of sale," but, at the trial, submitted proofs of specific sales during the closed season to substantiate the allegation. The error committed at the trial arose from the charge of the court to the jury, which was to the effect that possession alone during the prohibited season constituted an offense under the statute. This, in my opinion, was error, and the judgment should be reversed and the case remanded for a new trial.

CHADWICK, J., concurs with FULLERTON, J.

[No. 14851. Department One. November 27, 1918.]

JOHN F. LYON, *Appellant*, v. S. A. NOURSE, *Respondent*.[1]

CHATTEL MORTGAGES (1)—DISTINGUISHED FROM CONDITIONAL SALE —VALIDITY. Where an automobile was consigned to the purchaser subject to payment of draft attached to the bill of lading, one who advanced money to pay the draft, immediately delivering the bill of lading to the consignee who took possession of the car, cannot secure the advance by the giving and recording of a conditional bill of sale to the consignee, under the fiction of a sale to and resale by him; since it is not the office of a conditional bill of sale to secure money loaned without the formalities required of a chattel mortgage.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered January 4, 1918, upon findings in favor of the defendant, upon withdrawing the case from the consideration of the jury, in an action in replevin. Reversed.

Wm. H. Pratt and *Chas. Bedford*, for appellant.

A. H. Denman and *Rickabaugh & McElroy*, for respondent.

TOLMAN, J.—This is an action in replevin to recover an automobile, and damages for its detention, tried to a jury, but after the evidence was in, both parties moved the court to take the case from the jury and to render judgment as a matter of law. Thereupon the trial court granted the defendant's motion for judgment, made findings of fact and conclusions of law, and entered a judgment in favor of the defendant below (respondent here), awarding him the property in question, together with damages, and this appeal followed.

The facts, about which there is little dispute, so far

[1]Reported in 176 Pac. 359.

as necessary to be here set forth, are substantially as follows: In August, 1917, and for a year or two preceding that date, one Schabel was engaged in the retail automobile business in the city of Tacoma, selling principally the Paige car. Because of lack of capital, he was unable to pay cash for automobiles which he might order to place in stock, and arranged with respondent to finance him. That is, when he needed new cars to place on sale, Schabel ordered what he considered necessary from the distributor, the automobiles thus ordered were invoiced to him and shipped, and the bill of lading was sent attached to a draft for the sale price to a Tacoma bank, so that the cars must be paid for before Schabel could gain possession of them from the transportation company.

Upon the arrival of the shipment, including the car in question, Schabel procured the respondent, who was engaged in the financing business, to go to the bank, pay the draft, and deliver the bill of lading to Schabel, who thereupon surrendered the bill of lading to the transportation company, paid the freight, took the automobile to his place of business, and, at the same time or on the following day, he paid the respondent two per cent of the amount advanced to take up the draft, as his fee for financing, and respondent gave Schabel a conditional bill of sale in the usual form, which in this instance described the car in controversy as "One Stratford 6=51 automobile as equipped, Style 1917, Motor No. 73169, Car No. 92257," by the terms of which Schabel agreed to pay to respondent $1,196 on October 10, 1917, with interest at the rate of eight per cent per annum, which conditional bill of sale was filed for record with the county auditor within ten days. The automobile, which seems to have been marked "Paige" on the radiator and hub caps,

and to have had no other mark or name upon it, except the car number 92257 and motor number 73169, was displayed for sale in Schabel's place of business; and on August 25, 1917, the appellant purchased the car from Schabel, paying him $800 in cash, and turning in a used car at an agreed consideration of $950, making the purchase price $1,750. It seems to be admitted that the appellant had no notice of the respondent's rights or claims, except what constructive notice was given by the conditional sale agreement. Thereafter the respondent, learning of the sale of the car by Schabel to the appellant, made demand, and later, finding the car standing on the street, took it into his possession, and this action was instituted for its recovery.

From the admitted facts in the case, it seems clear to us that the respondent never had possession of the car prior to its delivery to Schabel, and had no title thereto. The car was sold and invoiced by the distributor to Schabel at what is apparently a dealer's price. Schabel was the recognized dealer in that make of cars in his city, and it was by all parties at all times intended that the car should pass into Schabel's possession as such dealer upon his paying the purchase price, and no doubt no one other than such an authorized dealer would have been permitted to purchase the car at the price at which it was invoiced. Being unable to pay, Schabel did what we all do under like circumstances, borrowed the necessary money from one who loaned for such purposes, and paid him a commission of two per cent for making the loan, and agreed to pay him interest until the loan was repaid.

It may be admitted that, for some purposes, the possession of the bill of lading is evidence of ownership of the goods therein described. But in this case the re-

spondent took up the draft and procured the bill of lading, not for the purpose of claiming the goods himself, but for the sole and only purpose of immediately delivering the bill of lading to Schabel so as to enable him to obtain possession of the goods which he had ordered for use in his own business, and which all parties had intended from the beginning should go to him and no one else, and except as a legal fiction, neither party to the transaction had any intention that any title or interest in the goods should vest in the respondent, except only that the goods should stand as security for the repayment of the money advanced.

It is not the office of a conditional bill of sale to secure money loaned. Its purpose is only to permit the owner of personal property to make a *bona fide* sale on credit, reserving the title in himself until the purchase price is fully paid in the manner and under the conditions laid down in the statute.

In *Cohen v. Schneider,* 70 Conn. 505, 40 Atl. 455, it appears that a person who owned the personal property in issue was in possession of the same and gave a bill of sale thereof to the plaintiff in that action, immediately taking back from the plaintiff a conditional sale agreement to himself. The court said:

"To construe the Act of 1895 as rendering a contract of conditional sale made under these circumstances, valid as against creditors of the vendee who had attached before any delivery of the goods to the plaintiff, would be to cause greater evils to creditors and purchasers than those against which the act was designed to furnish protection.

"Had the evidence in this case clearly shown that there was no delivery of the goods in question to the plaintiff before the attachment in the suit of Schneider, that would have been a sufficient ground for granting a nonsuit."

In *Payne v. Parker,* 95 Miss. 375, 48 South. 835, which involved somewhat similar facts, the supreme court of Mississippi said:

"We have no disposition to depart from the rule, now thoroughly established in this state, that personal property may be sold with verbal retention of title, and that the claim of the vendor to the purchase money will prevail over the claim of subsequent grantees. But we cannot hold as a matter of law that Payne ever actually owned the mules here in controversy. The whole transaction must be examined. The mules were not purchased from Payne in the first instance. They were bought from one Lawson. The sole purpose of the alleged sale to Payne was that title might momentarily vest in him for the purpose of an instantaneous resale, in order that the relation of the vendor and conditional purchaser might exist. The whole transaction might well be considered as nothing more than a verbal mortgage—an effort to substitute for a trust deed a pretended sale and resale, whereby innocent purchasers and incumbrancers would be defrauded. If this transaction is to be upheld, chattel mortgages will disappear. All borrowers upon personal property as security will simply agree with the lender to make a sale, accompanied by constructive delivery of the property, and buy the property back in the same transaction. We have here an illustration of a most flagrant wrong committed to the manifest injury of an innocent supply merchant. It is true that, under the previous decisions of this court, one taking a trust deed upon personal property must see to it that the person from whom the property was purchased has not reserved the title, or that he has been paid; but he cannot be defeated by constructive sales and resales, had between persons who in reality sustain no other relation than that of creditor and debtor. We will not push the doctrine one inch further than it has already gone. In order for the seller to enforce his claim, he must be in fact the owner of the property, and make a *bona fide* sale thereof to a *bona fide* purchaser, by which sale the actual possession of the property shall be in truth changed."

That Connecticut had a recording statute with reference to conditional sales agreements, and Mississippi apparently had not, does not in any way alter the principle involved or reflect on the doctrine announced.

We are convinced that it is not the purpose of our law to permit one, by going through the form of a transfer of his property to a creditor, or to one who is about to become such, and immediately taking back from such creditor a conditional sale agreement, to thus secure the payment of his debt without the formalities required by the statutes covering the execution of chattel mortgages. That this is so is shown by our statute, Rem. Code, §5291, which provides that:

"*Bill of Sale Void, When.*—No bill of sale for the transfer of personal property shall be valid, as against existing creditors or innocent purchasers, where the property is left in the possession of the vendor, unless the said bill of sale be recorded in the auditor's office of the county in which the property is situated, within ten days after such sale shall be made."

If a formal bill of sale is thus rendered void where there is no change of possession and the instrument is not recorded, certainly a pretended transfer of title without any written evidence, which therefore cannot be recorded, and which leaves the possession of the property involved just where it was before, should also be held to be void. Therefore, the argument that Schabel, by permitting the respondent to take up the draft, sold the automobile to respondent, and thereafter repurchased it at an advance of two per cent, presents a fiction only and not a fact.

As our conclusion upon the point discussed disposes of the case, the other points urged by appellant, in which we are inclined to think there is some merit, are not considered.

The judgment will be reversed, with instruction to the trial court to grant appellant's motion for judgment.

MAIN, C. J., MACKINTOSH, MITCHELL, and CHADWICK, JJ., concur.

[No. 14991. Department One. November 27, 1918.]

C. M. WILLIAMS, *as Trustee in Bankruptcy of Knosher's Incorporated, Appellant,* v. MRS. S. L. DAVIDSON, *Respondent.*[1]

BANKRUPTCY (5-8)—PREFERENCE—REASONABLE CAUSE FOR BELIEF. A creditor taking over a bankrupt's stock in good faith, after diligent inquiry as to the total indebtedness of the insolvent, and agreeing to pay all debts in full, is not liable to the trustee for receiving a preference, under subd. b of § 60 of the bankruptcy act, which requires that such person have reasonable cause to believe that he was receiving a preference.

CORPORATIONS (207, 208)—INSOLVENCY—PREFERENCE—TRUST FUND DOCTRINE. Under the trust fund doctrine, a creditor of an insolvent corporation who in good faith purchases all the assets, assuming all debts under misrepresentations, is liable to the trustee in bankruptcy although not liable under the bankruptcy act; and is not protected by compliance with the sales in bulk statutes, Rem. Code, § 5296.

SAME—EXTENT OF LIABILITY. In such case, the liability on securing the preference is limited to the *pro rata* share which excluded creditors would have been entitled to upon a ratable distribution of the assets.

CHADWICK, C. J., and FULLERTON, J., dissent.

Appeal from a judgment of the superior court for King county, Allen, J., entered August 8, 1918, upon findings in favor of the defendant, dismissing on the merits an action to set aside a fraudulent transfer of corporate assets, tried to the court. Reversed.

[1]Reported in 176 Pac. 334.

Bausman & Oldham and *Donald G. Eggerman*, for appellant.

Hartman & Hartman, for respondent.

TOLMAN, J.—This action was brought by the appellant, as trustee in bankruptcy of Knosher's Incorporated, a bankrupt corporation, to cancel and set aside a transfer of the corporate assets theretofore made to the respondent, upon the ground that the transfer was preferential and void and was made to the respondent, the principal corporate creditor, with intent to hinder, delay and defraud the other creditors of the corporation. The complaint charged that the transfer was made by the corporation within four months preceding its adjudication as a bankrupt, and at a time when it was wholly insolvent; that the respondent knew, at the time of the transfer, of such insolvency, and that the transfer effected a total depletion of the corporate assets, leaving the other corporate creditors wholly unpaid. The relief sought was cancellation, the appointment of a receiver, and the recovery from respondent of the assets which she received, or their value. The respondent, answering, admitted the transfer, but as an affirmative defense, alleged that she purchased the assets from the corporation in good faith in compliance with the sales in bulk law, that she assumed and paid corporate debts to the amount of $15,076.35, which the corporation had represented to her was its total indebtedness, and that therefore she had acquired the assets for a valuable consideration, in good faith. The affirmative matter in the answer was denied. Upon a trial below there was but little serious conflict in the evidence, and, briefly stated, the facts which appear to be established are as follows:

Knosher's Incorporated was a domestic corporation, operating a retail store in the city of Seattle,

with a capital stock of $15,000. Respondent's deceased husband, S. R. Davidson, had been a creditor of this corporation, his debt being evidenced by a demand note, upon which there was due on October 2, 1917, $8,022.25. This note was secured by a chattel mortgage upon the stock and fixtures of the corporation, which had never been filed for record. Prior to Mr. Davidson's death, which occurred in August, 1917, he had made repeated demands for payment of this debt, and had sent an auditor to the debtor's store to check up its affairs, and placed an agent in charge of the store and business. The respondent is the executor of the nonintervention will of her deceased husband, acting without bond, and is his sole beneficiary under the will. Upon the probate of the will, the respondent, with the assistance of her attorney, vigorously renewed efforts to enforce collection of her claim against Knosher's Incorporated, and her attorney, by threats of a receivership and representations that it was practically bankrupt, succeeded in placing respondent's agent in full and exclusive charge and control of the receipts and disbursements of the corporation's business, and the agent so remained in control until the property was transferred by a bill of sale to the respondent on October 2, 1917. During all of this time, the corporation was heavily indebted, the greater portion of its indebtedness being past due, and it was unable to pay, and apparently was in a failing condition. The respondent and one MacMaster, to whom it owed $1,800, were its most pressing creditors. As its credit standing was poor, it was unable to purchase new goods, and its stock had run down. The assets consisted of the stock of goods and fixtures, which, according to an inventory taken by the respondent, amounted in value to the sum of $15,053.70.

Shortly before the time of the transfer, it developed that a list of creditors furnished to the respondent by the corporation was incomplete, the debt to MacMaster having been omitted therefrom. MacMaster, finding that the respondent was in full possession of the corporate assets, and that no provision had been made for his claim to share in the proceeds of sales, employed an attorney, who threatened to place the corporation in the hands of a receiver, or take other drastic measures, unless his client was permitted to share in the proceeds. Negotiations ensued between MacMaster and respondent, which resulted in an agreement by respondent to purchase the MacMaster claim for $1,200 and take an assignment of it to herself. Upon the appearance of the MacMaster claim, respondent demanded that the corporation transfer all of its property to her, and suggested as the only alternative an involuntary liquidation. The corporation, through its officers, acquiesced in this demand, and a bill of sale was drawn and an affidavit under the sales in bulk law was prepared, which was signed and verified by the president of the corporation. The list of creditors verified by this affidavit showed an indebtedness aggregating $15,076.35, including the respondent's claim for $8,022.25, the MacMaster claim for $1,800, which respondent paid or purchased at the time of receiving the bill of sale and affidavit, by paying therefor $1,200 of her own money, and another note of the corporation for $1,274.84, upon which the respondent was personally liable as a guarantor.

It is conceded that five claims against the corporation, amounting to $4,538.23, were not included in this list of creditors made by the corporation and verified by its president, and that these claims have not been paid. It is established, however, by the evidence that

the respondent took special pains to have the books of the corporation examined, its officers closely questioned, and every inquiry made which good faith required, without discovering the omission of these claims from the affidavit, or any fact which would put her on notice of such claims, or any of them. None of the excluded creditors were advised of, or had any notice of, the transfer of the corporate assets to the respondent until after it had taken place. One of these creditors wrote the respondent's attorney about the middle of October, 1917, and then learned what had taken place, and on or about November 7, 1917, respondent was fully advised of the existence of all of the corporate indebtedness which had been excluded from the affidavit under the sales in bulk law. Immediately upon the transfer being made, respondent advanced from her personal funds, in addition to the $1,200 used to purchase the MacMaster claim, about $700, which was paid upon the pressing debts shown in the affidavit, and these sums are practically all that the respondent advanced at any time in this transaction. The remainder of the corporate debts covered by the sales in bulk affidavit, including her own, have been paid out of the proceeds of the business, which respondent operated after the transfer, buying new stock, commingling new goods with old, and operating the business generally as her own.

On December 8, 1917, and within four months after the transfer, a petition in bankruptcy was filed against Knosher's Incorporated, which charged the transfer referred to as an act of bankruptcy, and on January 2, 1918, the corporation was adjudged a bankrupt, and appellant herein was duly appointed trustee, and having qualified, was authorized by the bankruptcy court to institute this action. The trial court made findings of fact, conclusions of law, and rendered judgment dis-

missing the action, from which this appeal is prosecuted.

It seems manifest that the appellant has no right of action against the respondent under subdivision b of §60 of the bankruptcy law, because it is there provided that, before recovery can be had, it must appear that the person receiving a preference or to be benefited thereby must have had reasonable cause to believe, not only that the bankrupt was insolvent, but that he was receiving a preference. And in this case the respondent, having made diligent inquiry and ascertained, as she believed, the total indebtedness of the insolvent corporation, and assumed and bound herself to pay it all in full, could not, under that state of facts, have received a preference. Hence the trial court did not err in holding that there was no cause of action under the bankruptcy law.

However, appellant's right of recovery is not limited to the bankruptcy law, but if the transfer is preferential and void under the law of this state, he is entitled to recover. The trust fund doctrine as applied to insolvent corporations was announced by this court in *Thompson v. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25, was exhaustively discussed, considered and reaffirmed in *Conover v. Hull,* 10 Wash. 673, 39 Pac. 166, 45 Am. St. 810, and has been followed in an unbroken line of decisions ever since that time. So that if anything may be said to be settled, this doctrine has become the settled law of this state, and we cannot depart from it. The trust fund doctrine from first to last is to the effect that the property and assets of an insolvent corporation constitute a trust fund in the hands of the managers of the corporation for the benefit of each and all of its creditors ratably, and although a private debtor may prefer creditors, even to the exhaustion of all his assets, an insolvent cor-

poration will not be permitted to do or suffer anything which will permit one or more creditors to obtain a preference, no matter what the good faith of such creditor may be.

But it is contended that the trust fund doctrine, after all, is in all respects subject to the equitable principles covering trusts in general, and that third parties will be protected in their dealings with the trustee, even if he has violated his duty, and that a stranger who has purchased from the trustee without notice of adverse claims will receive good title. In this case, however, the respondent had ample notice of the insolvency of the corporation; and though, after the exercise of due diligence, she did not know of the existence of the excluded creditors, yet that cannot give her equities superior to theirs, because they were likewise in ignorance of the plan to take over the assets, and having the right to rely upon the settled law of this state, had no reason to inquire if such a course of action was in contemplation. Respondent's acts, done in reliance upon the representations of the corporate officers that there were no other creditors, though done in good faith on her part, were in effect a legal fraud upon the rights of the excluded creditors, and made that fraud possible. So that, under the familiar rule of equity that, as between two innocent persons, the one whose act caused the loss and made the fraud possible must suffer the consequences, respondent must suffer here, and cannot be heard to claim that her equities are superior to those of the excluded creditors.

"This court, since the case of *Thompson v. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25, has adhered to the doctrine that, although a private debtor

may prefer creditors even to the exhaustion of his property, this will not do in the case of an insolvent corporation, *no matter what the good faith of its creditor is.*" *Jones v. Hoquiam Lumber & Shingle Co.*, 98 Wash. 172, 167 Pac. 117.

Respondent further contends that she is protected by the sales in bulk law, and cites *Friend v. Rosenfeld-Rovig Co.*, 87 Wash. 329, 151 Pac. 776. This case is not applicable because the debtor therein was an individual, and the trust fund doctrine in nowise applied. Nor can the statute, Rem. Code, § 5296, apply, because the corporation was admittedly insolvent, was known to the respondent to be insolvent, and an insolvent corporation, in view of the trust fund doctrine, may not, by calling a transfer a sale, enable a creditor who, like respondent, is moved primarily by the desire to collect his demand, to secure a preference over other corporate creditors. To hold otherwise would be to permit dishonest corporate officials to wholly nullify the trust fund doctrine.

It follows that the judgment appealed from must be reversed, but not necessarily that the court below be directed, as contended for by the appellant, to enter a judgment for the value of the corporate assets received by respondent. This being an equitable proceeding, and respondent having acted in good faith throughout in reliance upon the affidavit and representations of the president of the debtor corporation, she is entitled to be protected against loss so far as possible without diminution of the rights of the excluded creditors. It appears in the record without dispute that the claims paid by and through the transfer to respondent amounted to $15,076.35; that the excluded claims, which constituted the remainder of the corporate indebtedness, amounted to $4,538.23, and that, therefore, the total indebtedness of Knosher's Incor-

porated was $19,614.58. The total assets at the time of the transfer, as shown by the inventory, were $15,053.70, which, if ratably distributed to all the corporate creditors, would have paid a dividend of a trifle less than seventy-seven per cent. Fixing the ratio then at seventy-seven per cent, in lieu of allowing interest on the excluded claims, the equitable rights of the excluded creditors will be fully satisfied by the entry of a judgment in favor of the appellant, as trustee, and against the respondent for the sum of $3,494.43, together with costs.

The case is reversed, and remanded with directions to enter a judgment accordingly.

MAIN, C. J., MACKINTOSH, CHADWICK, and MITCHELL, JJ., concur.

ON REHEARING.

[*En Banc.* May 31, 1919.]

PER CURIAM.—Upon a rehearing *En Banc* a majority of the court still adhere to the opinion heretofore filed herein, and for the reasons there stated, the judgment is reversed.

CHADWICK, C. J. (dissenting) — Upon a rehearing *En Banc* a majority of the judges incline to our former opinion. I concurred in that opinion, but I am now convinced that the court fell into error. While there is nothing that I can say that will change the result, I feel it to be my duty to explain why I think we were wrong in the beginning, and why it is wrong to adhere to our opinion.

I am willing to subscribe to the trust fund doctrine, which this court has affirmed without material qualification, and vigorously, since *Thompson v. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25; but the trust fund theory is not substantive law *ex propria*

vigore—it is a rule of equity arising, first, in the conscience of the chancellors and finally recognized generally as a rule binding on all who deal with corporate assets. The power of the legislature to limit, qualify or negative any rule of decision cannot be questioned. The legislature has functioned upon the precise subject-matter of this controversy. The sales in bulk law (Rem. Code, § 5296 *et seq.*) has, to the extent that it is applicable, modified the trust fund theory as applied to the sale of corporate assets, if those assets be a "*stock of goods, wares or merchandise.*" By that act, the right of an individual or a corporation to sell a stock of goods is recognized. The legislature must have had in mind the hardship that had come all too often to innocent buyers of stocks of goods, as our reports will show. That the innocent buyer might have protection and the sale and transfer of goods might go on as a favored relation under the law, as it has ever been, it is provided:

"It shall be the duty of every person who shall bargain for or purchase any stock of goods, wares or merchandise, in bulk, for cash or on credit, before paying to the vendor, or his agent, or representative, or delivering to the vendor, or his agent, any part of the purchase price thereof, or any promissory note or other evidence therefor, to demand of and receive from such vendor, or agent, *or if the vendor or agent be a corporation, then from the president, vice-president, secretary, or managing agent of such corporation,* a written statement, sworn to substantially as hereinafter provided, of the names and addresses of all the creditors of said vendor, to whom said vendor may be indebted, together with the amount of the indebtedness due and owing, and to become due and owing, by said vendor to each of said creditors; and it shall be the duty of said vendor, or agent, to furnish such statement, which shall be verified by an oath to the following effect:" Rem. Code, § 5296.

Now, if the rule of the majority obtains, the words "or if the vendor or agent be a corporation, then from the president, vice-president, secretary, treasurer or managing agent of such corporation" are without meaning and lumber the statute without having a place therein; for it would follow that, whatever the good faith of the purchaser of a stock of goods may be, however careful he may have been to protect himself under the law, however literally he may have followed the terms of the statute, the affidavit which the statute says may be made by the president, vice president, secretary, treasurer or managing agent of such corporation, if the vendor be a corporation, will not protect him if the corporation has other debts than those scheduled by the agent of the corporation.

What means the language, "It shall be the duty" of one who buys a stock of goods to *do* certain things? Unless we abandon all rules of construction it means that, if the legal duty imposed as a condition precedent to a sale in bulk is performed, title will pass to the innocent purchaser. The innocence and good faith of respondent are not impeached. She is drawn into a pit of our own making, after she has done all that the written law of this state says that she should have done.

If it were not for the trust fund theory, which does not obtain in all of the states, but which we confess to be the rule here, a sale by an insolvent corporation would be good if made to an innocent purchaser without notice. It is only because the courts have said the assets of a corporation are a trust fund for all creditors that it is so, not because of any statute; therefore, it would seem to follow that when the legislature, having notice of our holdings, passes a law which says that a purchaser who complies with its terms, whether the

sale be made by a corporation or by an individual, is good, I cannot understand why it should not be so.

The act is drawn for the announced purpose of protecting a vendee, and it provides the manner of that protection. It is drawn with a like intent to compel a truthful deliverance on the part of the seller. It fixes a penalty for the false swearer. It makes him guilty of perjury and provides for imprisonment in the penitentiary or a fine not exceeding the sum of one thousand dollars.

In the instant case, the respondent was a heavy creditor of the corporation. To save herself she agreed to buy the stock and to pay the debts which had been listed for her benefit. She was willing to pay that price for the stock, and we are not in a position to assume that she would have paid more. She took every precaution that the law demanded, and is now compelled to pay that which she would not have paid if she had known of other debts.

It may be said that, because respondent was a creditor, she cannot claim the protection of the statute. My answer to this is that the statute makes no such exceptions. It applies to all who act in good faith.

It seems to me that the statute settles the case; but if the statute permitted of any doubt or required any construction, all question is foreclosed. This case falls squarely upon the foundation, and fits completely the superstructure, of *Friend v. Rosenfeld-Rovig Co.*, 87 Wash. 329, 151 Pac. 776.

"As we understand the argument of the appellant, it is not claimed that there was any actual fraud in the transfer from Leo Lynch to the respondent. But it is argued that the transfer was a fraud in law because one of the creditors was omitted from the affidavit. Upon the trial, Leo Lynch testified that he had previously informed the respondent Rosenfeld-Rovig Com-

pany that he owed his sister some money, but at the time he made the affidavit stating the names of his creditors, he made no such statement. The persons present at the time the affidavit was made testified that he made no statement to the effect that he owed his sister anything. The trial court found that, at the time of the transfer, the respondent had no notice or knowledge that there was any debt owing by Leo Lynch to his sister; that the first notice the respondents had of this fact was after they had taken possession of the stock of goods and were negotiating for the sale thereof, when Miss Lynch stated that she was a creditor of her brother. She permitted the property to be sold and the debts to be paid before any action was taken by her to avoid the sale."

It may be said of that case that the vendee had no notice that the party was insolvent, and it may be contended that the respondent knew that her vendor was insolvent, but that is not controlling, for the sales in bulk law was enacted for the protection of those who buy of insolvent vendors, as well as solvent vendors. If all purchases were made from solvent firms there would be no reason for the enactment. But knowledge of insolvency would not deny respondent her legal right, for another reason. She was buying under a contract which bound her to pay all the disclosed liabilities of the vendor.

I have extended my views merely for the purpose of writing it into the books as one of the last acts of my judicial career that I was wrong. I believe that respondent has been undone of her rights, and, while it affords poor consolation, I can do no more in the way of correcting my error than to confess my fault.

FULLERTON, J. (dissenting)—For the reasons stated by Judge Chadwick, I think the majority err in the conclusions reached in this case. I therefore dissent from the judgment directed.

[No. 14862. Department One. November 27, 1918.]

SEATTLE & LAKE WASHINGTON WATERWAY COMPANY, *Respondent*, v. J. P. M. RICHARDS *et al.*, *Appellants*.[1]

MONEY LENT (2)—VOLUNTARY PAYMENTS—EVIDENCE—SUFFICIENCY. Where a waterway company had agreed to sell to a bank all certificates issued for filling tide lands, and advanced the first delinquent installment to pay holders of negotiated certificates, the money could be recovered after the bank foreclosed the certificates for the full amount, when the preponderance of the evidence was to the effect that the advance was made at the bank's request to maintain the credit of similar certificates, under an agreement that it would be returned when collected from the source primarily liable.

Appeal from a judgment of the superior court for Spokane county, Henry L. Kennan, judge *pro tempore*, entered October 3, 1917, upon findings in favor of the plaintiff, in an action to recover money and to establish an interest in real property, tried to the court. Affirmed.

Graves, Kizer & Graves, for appellants, contended, among other things, that plaintiff's payment was voluntary and cannot be recovered. 30 Cyc. 1298-1301; 27 Am. & Eng. Ency. Law (2d ed.), p. 255; *Williams v. Miller & Co.*, 1 Wash. Terr. 88; *Brundage v. Burke*, 11 Wash. 679, 40 Pac. 343; *Phelps v. Tacoma*, 15 Wash. 367, 46 Pac. 400; *Holly Street Land Co. v. Beyer*, 48 Wash. 422, 93 Pac. 1065; *Stahl v. Schwartz*, 81 Wash. 293, 142 Pac. 651; *Traders' & Truckers' Bank v. Black*, 108 Va. 59, 60 S. E. 743; *Schlaefer v. Heiberger*, 4 N. Y. Supp. 74; *Montgomery v. Gibbs*, 40 Iowa 652; *Clancy v. McEnery*, 17 Wis. 183; *Wilcox v. Cheviott*, 92 Me. 239, 42 Atl. 403; *Coates v. Clayton*, 23 Tex. Civ. App. 62, 56 S. W. 118; *McClure v. Trask*, 161 N. Y. 82, 55 N. E. 407; *Devereux v. Rochester German Ins. Co.*,

[1]Reported in 176 Pac. 340.

98 N. C. 6, 3 S. E. 639; *Briggs & Cobb v. Barnett,* 108 Va. 404, 61 S. E. 797; *Merrill v. Gordon,* 15 Ariz. 521, 140 Pac. 496; *Morris v. Tarin,* 1 Dallas (Tex.) 147; *Irvine v. Hanlin,* 10 Serg. & Rawle (Pa.) 219; *Soderberg v. King County,* 15 Wash. 194, 45 Pac. 785, 55 Am. St. 878, 33 L. R. A. 670; Harris, Subrogation, §§ 792, 794, 809, 810; *Whitney Estate Co. v. Northern Assurance Co. of London,* 155 Cal. 521, 101 Pac. 911, 23 L. R. A. 123, 124-127, note; *Charnock v. Jones,* 22 S. D. 132, 115 N. W. 1072, 16 L. R. A. (N. S.) 233, 234, note; *Crumlish's Adm'r v. Central Imp. Co.,* 38 W. Va. 390, 18 S. E. 456, 45 Am. St. 872, 23 L. R. A. 120.

Donworth & Todd and *Post, Russell, Carey & Higgins,* for respondent, contended, among other things, that the action lies for money had and received. *Heard v. Bradford,* 4 Mass. 326; *Robert Reis & Co. v. Volck,* 151 App. Div. 613, 136 N. Y. Supp. 367; *Houser v. McGinnas,* 108 N. C. 631, 13 S. E. 139; *Pracht v. Daniels,* 20 Colo. 100, 36 Pac. 845; *Town of Milwaukee v. County of Milwaukee,* 114 Wis. 374, 90 N. W. 447; *Moody v. Northwestern & Pacific Hypotheek-Bank,* 20 Wash. 413, 55 Pac. 568; *Selfridge v. Gill,* 4 Mass. 95; *Catterlin v. Somerville,* 22 Ind. 482; *Hale v. Passmore,* 4 Dana (Ky.) 70; *Soderberg v. King County,* 15 Wash. 194, 45 Pac. 785, 55 Am. St. 878, 33 L. R. A. 670; *Merchants Bank of Port Townsend v. Superior Candy etc. Co.,* 41 Wash. 653, 84 Pac. 604; *Smith v. Gruber Co.,* 81 Wash. 111, 142 Pac. 493.

The doctrine of subrogation is applicable. *Johnson v. Martin,* 83 Wash. 364, 145 Pac. 429, L. R. A. 1916C 1057; *Murray v. O'Brien,* 56 Wash. 361, 105 Pac. 840, 28 L. R. A. (N. S.) 998; *Netherlands American Mortgage Bank v. Grafke,* 100 Wash. 188, 170 Pac. 876; *Murray v. Meade,* 5 Wash. 693, 32 Pac. 780; *South Omaha Nat. Bank v. Wright,* 45 Neb. 23, 63 N. W. 126.

The plaintiff was not a mere volunteer. 37 Cyc. 366, 367, 439; *Ketchum v. Duncan*, 96 U. S. 659; *Washington Loan & Trust Co. v. Ritz*, 37 Wash. 642, 80 Pac. 174; *Claflin v. South Carolina R. Co.*, 8 Fed. 118; *Champion v. Investment Co.*, 45 Kan. 103, 25 Pac. 590, 10 L. R. A. 754.

PER CURIAM.—This action was brought by the respondent, Seattle & Lake Washington Waterway Company, against the appellants, J. P. M. Richards and the Spokane & Eastern Trust Company, to recover a sum of money and to establish an interest in realty, the title to which was held by Richards as trustee. There was a recovery in the court below, and the case is before us on the appeal of the adverse parties to the judgment.

The undisputed facts necessary to be recited to an understanding of the controversy are, in substance, these: The respondent is the holder of contracts entered into with the state of Washington for excavating certain waterways and filling above tide water certain tide lands at the city of Seattle. For the performance of the work the respondent receives from the state, through its land commissioner, certificates to the amount of the cost of the work with fifteen per cent added, which, when duly recorded, are first liens upon the lots and blocks of tide land filled. The contracts were entered into early in the state's history and cover a somewhat extensive territory. At the time they were entered into, the state was the owner of the lands, but they have since passed by deeds from the state into private ownership, the deeds being made subject to the rights of the respondent under its contracts. The purchaser of the land, however, assumes no personal obligation to redeem from the lien of the certificates. While he is granted the right to pay off the

lien in ten annual installments with the accumulated interest at a fixed per centum, it is his privilege, not his obligation, to do so; his failure to pay any of the accruing installments only subjects the lien to foreclosure. To raise funds to carry on the work, the respondent sells the certificates. In 1907, it entered into a contract with the appellant Spokane & Eastern Trust Company by which the respondent agreed to sell, and the appellant agreed to buy, at a named discount, all the certificates which might be earned by respondents for filling the tide lands known on the recorded plats as blocks 395, 396, and 398. Those blocks were thereafter filled and certificates issued therefor aggregating a large sum, all of which were taken pursuant to the terms of the contract by the trust company. The trust company did not retain the certificates as an investment of its own, but sold them to its customers, making its profit out of the difference between the amount paid for them and the amount it was able to realize on their sale.

At the time the certificates were earned, all of the lots in block 398 were in private ownership. The first installment upon the certificates issued on these lots became due in September and October of 1908. The sum due on these amounted to $22,562.81. The owners did not meet the payment, and to protect the securities in the market, and perhaps with the idea that the owners might later be induced to pay, the respondent advanced the money to the trust company without requiring a written agreement of any sort, and this sum the trust company accepted and disbursed to the holders of the certificates in accordance with their respective interests.

All of the owners, however, could not be induced to make the payments, and it was found necessary to foreclose certain of the certificates. To this end the

appellant Richards, then the president of the trust company, procured an assignment of the certificates from the purchasers to himself as trustee, and a foreclosure proceeding was instituted in his name as plaintiff. In the complaint he alleged that nothing had been paid upon the certificates, and the prayer of the complaint was for a decree in accordance therewith. While one Bussell, an owner, defended, he did not set up a plea of payment, and decree was entered in the proceeding foreclosing the lien of the certificates for the amount shown to be due without deducting the amount of the advancement made by the respondent. The lands were subsequently sold under the foreclosure decree, a part for cash to third parties, and the remainder to Richards as the judgment creditor. The cash received amounted to $25,680.15. This sum and the amount bid by Richards, which was credited on the decree, satisfied the decree in full.

It was to recover a *pro rata* share of the cash received at this sale and to establish an interest in the real property purchased by Richards that the present action was instituted; the respondent claiming that it was entitled to such proportionate share of the money and property received by Richards in virtue of the foreclosure action as the amount advanced by it on the first installment due on the certificates foreclosed bore to the entire amount due thereon. The judgment of the court embodied the view taken by the respondent.

The appellants pleaded in defense of the action that no agreement was entered into between the parties for the repayment of the sum advanced, and that no obligation rested upon them so to do; further alleging that the advancement was made by the respondent for its own protection, in that it was important to it that the certificates should not be discredited among in-

vestors on whom it depended to market certificates which it had theretofore issued and thereafter contemplated issuing, invoking the rule relating to voluntary payments. While the recitals we have made may cause it to appear that the defense has no very strong moral support, since its effect, if established, would be to cause a loss to the respondent of the sum advanced and an apparently corresponding unearned gain on the part of the appellants, the evidence disclosed that the matter was not entirely one-sided in this respect. The circumstances concerning this need not be detailed. It is sufficient to say that actions were begun by one of the owners of the filled tide lands against the respondent the effect of which, if successful, would be to scale the face value of the certificates; that these actions were apparently going against the respondent, when the appellants, being perturbed thereby, employed counsel of their own to assist in their defense, expending in that behalf and in costs incidental thereto a sum in excess of $13,000, which sum has in no way been returned to them. While this transaction on the part of the appellants, since it was voluntary, does not constitute a defense, legal or equitable, to the money or property sought to be recovered, it explains why the contest is made, and relieves the defense of that moral obliquity which perhaps might otherwise seemingly attach to it.

The actual controversy, therefore, hinges on the question whether the payment was voluntary or involuntary; that is, whether it was made under an agreement, express or implied, that it should be returned to the respondent when collected from the source primarily liable. The parties have brought much into the record in support of their respective contentions. On the part of the appellants, is the fact that the respondent first tendered the money with a written

agreement attached to the effect that a repayment would be made when collected from the primary source, and that this was refused by the appellants. Further, it was shown that the payment was under consideration at a time when the parties were negotiating concerning a contract for the sale of other certificates, and that this latter contract was executed simultaneously with the payment of the delinquency, the inference drawn being that the one was the inducement for the other. It was the testimony, also, of the only witness present at the time of the adverse claim of the money, aside from the principals participating therein, that nothing was said at that time concerning the transaction other than a statement of the respondent's representative that the money advanced, in so far as the trust company or the holders of the certificates were concerned, was a payment by the landowner, but, as a matter of fact, the money was actually advanced by a subsidiary company of the respondent, and if later the trust company could, through its good offices, have the money returned, it would be appreciated; that no reply to this statement was made, and no promise or agreement of any sort with respect to returning the money was made or entered into. The appellant Richards had no recollection of the transaction; his testimony was that, after the money was paid over, the new contract executed, and the parties had separated, he directed the witness mentioned to make a memorandum of the conversation and file it with the papers relating to the transaction, and that he did not charge his memory with the matter further.

On the other side, circumstances were shown tending to show that the first tender was refused, not because of the agreement to repay, but because it brought into the transaction third parties with whom the appellants did not wish to become bound; their desires

being to confine the transaction to the immediate parties in interest. As to the second proposition, it is said that the appellant trust company was as desirous of the new contract as was the respondent, and that the certificates which it had theretofore sold might not appear to be in default was chiefly, if not wholly, its concern, as the respondent had been engaged in the business for many years and had issued and sold many thousands of dollars in similar certificates, some of which had been in default without a serious impairment of the market for them; and that it was because of the appellants' earnest solicitation that the advancement was made. The testimony of the respondent's representative at the transaction in which the money was paid over does not differ essentially from the version given by the appellants' witness. He, however, refers to a number of other conferences between himself and Mr. Richards, and from the whole testifies that there was a clear understanding between the parties that the money was an advancement and not a payment, and was to be returned when collected from the primary source. It was shown, also, that one lot included in the delinquent list was owned by a man named Neville, and that the money paid to the appellant trust company included the delinquency on this lot. Afterwards, but prior to the foreclosure proceedings, Neville paid to the trust company the delinquent installments, two in number.

Shortly after the payment, Mr. Williams, a representative of the appellant trust company, was in Seattle and took up with the respondent's manager the matter of the payment and the manner in which the respondent's share should be returned, the money advanced having been made by a subsidiary company of the respondent. Mr. Williams was unable to recall the conversation, but the manager testified that it was

agreed that the particular payment should be sent to Mr. Parry, as trustee, and that all subsequent payments on block 398 should be handled in the same way. The respondent's share of this payment, measured by the sum turned over to the trust company, was $468.78, and this sum Mr. Williams forwarded on his return to Spokane, accompanied by the following letter:

"Spokane and Eastern Trust Company.
"Spokane, Wash., April 25, 1910.
"Mr. Edgar Ames, 1101 Alaska Building,
"Seattle, Washington.
"Dear Sir: According to our conversation of a few days ago, I am enclosing herewith a letter addressed to Mr. Will H. Parry, Trustee, with cashier's check attached for $468.78. Kindly acknowledge receipt at your convenience, and oblige. Very truly yours,
"H. F. Williams,
"Manager Securities Department."

Many other circumstances were introduced by the parties in support of their respective contentions, but we think it would profit nothing to review the matter further. Enough is set forth to show the nature of the controversy, and that to array and discuss the evidence would be but an attempt to vindicate a conclusion reached on a disputed question of fact, interesting, perhaps, with reference to the particular controversy, but in no way valuable as a precedent. It is the opinion of a majority of the department that a preponderance of the evidence supports the conclusion reached by the trial court that the advancement was not voluntary in the sense that it was made without an agreement for its return. Within the view of the facts, there is no error in its judgment. The conclusion also renders it unnecessary to notice the legal questions discussed, which a contrary view of the facts might require.

The judgment will stand affirmed.

[No. 14934. Department One. November 27, 1918.]

JOHN DE LEON, *Respondent*, v. DOYHOF FISH PRODUCTS COMPANY, *Appellant*.[1]

MASTER AND SERVANT (122-1—129)—ACTIONS — COMPLAINT — ASSAULT BY SERVANT. A complaint for assault upon an employee by the master's superintendent fairly raises the question whether he was at the time acting within the scope of his employment, where it is alleged that acting as superintendent, with power of supervision over the men, he accosted plaintiff while employed, falsely accused him of inciting a strike, and wantonly and maliciously struck him.

SAME (172, 174-1)—ASSAULT BY SERVANT—LIABILITY—SCOPE OF EMPLOYMENT. Where a superintendent was placed in charge of a distant cannery with general power to maintain discipline at his own discretion, which he abused in the exercise of his authority, when he lost his temper and committed a malicious assault upon an employee whom he sought to discipline, the master is liable.

DAMAGES (79)—EXCESSIVE DAMAGES—PASSION OR PREJUDICE. A verdict for $1,000 for a malicious assault by a servant does not alone reflect passion or prejudice where plaintiff was painfully injured.

Appeal from a judgment of the superior court for King county, Hall, J., entered March 11, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

Bogle, Merritt & Bogle, for appellant.

Benj. S. Ohnick and *Van C. Griffin*, for respondent.

CHADWICK, J.—The appellant conducts a cannery at Scow Bay, Alaska. One James H. Scott was superintendent. Respondent worked at the cannery during the season of 1917. He was under the immediate direction of a Chinese boss. It was the duty of the superintendent to look after the general conduct of the business; to have general charge over labor and of production; to maintain discipline and quell strikes or

[1]Reported in 176 Pac. 355.

any uprisings that occurred at the cannery. The cannery was situate at such a distance from the home office, which is in Seattle, that it was oftentimes, if not altogether, necessary to allow Scott a broad discretion, and in such matters the policy of the company was entirely in his hands. Prior to the 21st day of June, there had been some discontent among the workmen. They had betrayed an independence of authority. They had "murmured against the good man of the house." On that day the respondent, who had been, or was suspected of, breeding strife and inciting the crew to strike, was taken to the superintendent, at his request, by the Chinese foreman. Scott wanted to "get a look at him," "find out who he was," and "set the fellow right." Respondent's story is:

"The Chinese boss called me, telling me that the superintendent of the cannery wants to see me, so I followed him and he brought me to the company's store. When I entered down there I didn't see the superintendent of the cannery, but the storekeeper was present, and that storekeeper told me to wait for Mr. Scott. I waited four or five minutes and still Mr. Scott, the superintendent, wasn't come. So I went outside in the porch and picked up a small piece of wood, and then opening the small blade of my knife I began whittling, at the same time smoking a pipe. In about three minutes I heard the voice of the superintendent inside the store calling me in, and saying, 'Hey there, come here.' He was very mad. I came in the store and stood there in front of him, and he said, 'What is your name—where have you worked before?' I said to him, 'I have worked at the Deer Harbor cannery.' He said, 'What are all those things in your hand?' I put all those things, a pipe, and a small knife and piece of wood on the counter, and he said, 'So you came down here to make trouble, making these boys strike.' 'No sir,' I said to him, 'I came down here to make a little money so as to go to college.' Then Mr. Scott said, 'We don't want these things to happen again down here; if I

ever see you again doing this thing I will knock your God damn head off.' I said, 'I can't understand this thing, let me explain.' Then he rushed forward toward me and with his fist struck me on this right eye, making two great cuts, wide open, and the blood running profusely on my jumper and causing me great pain. Then I was down there trying to wipe it off and he said, 'You go down to the bunk house,' and I went down to the bunk house."

Scott's version of the occurrence is as follows:

"When he first came in I asked him what cannery he had worked at. He told me and I asked him why he didn't do what the Philippino boss and the China boss instructed him to do. I think I continued asking a question before he really had a chance to answer that, by asking him why he was causing trouble among the boys. He answered me, saying, 'Here, Mr. Scott, I don't want any trouble with you.' I said, 'Put away that knife,' and he continued whittling. He was standing exactly at the corner of the counter, and I was not in a position where I could use my right hand to strike him. He threw his shoulder over to one side and his hand down. I reached over and grabbed the knife and held it there and said, 'Now, drop that.' He tried to raise the knife and I hit him. I hit him only once. After that I told him to go down to the bunk house and see if he couldn't behave himself and not cause any more trouble to the bosses. I think that is in substance practically all the conversation that occurred between us."

The justification for the assault suggested in Scott's testimony was not plead as a defense, but the court submitted the issue to the jury, and the verdict of the jury upon that issue being adverse to appellant, the case presents itself to this court as one upon the general issue, whether the superintendent was acting within the scope of his employment at the time he committed the assault.

The first error assigned is that the complaint does

not state a cause of action. It is contended that the time and place of the assault does not constitute a test of the employer's liability, and that the employer cannot be held liable unless it is found that the employee was, at the time of committing the wrongful act complained of, performing some duty for which he was employed. It is alleged that Scott was the superintendent of the cannery and, as such superintendent, had supervision of the cannery and men employed at the cannery, including plaintiff; that the superintendent, acting on behalf of respondent, accosted plaintiff while employed at the cannery and falsely accused him of inciting other employees at the plant to strike, and had used vile, abusive and insulting language of and toward respondent, and thereupon wantonly and maliciously struck him, etc.

While the complaint might have been drawn in more exact terms, we are convinced that enough was plead to put the appellant to its defense. It fairly raises the question whether the superintendent was at the time engaged in the furtherance of his master's business. The legal conclusion that he was so engaged would not have aided the complaint. To a certain extent, service implies responsibility, and the allegation that the servant had supervision of the men employed was enough to put appellant to its answer. A showing that the servant was not so engaged, or that the assault was to accomplish a purpose personal to the servant, would be a complete defense.

All other assignments of error go, save one, to the sufficiency of the testimony to sustain the verdict.

When a party is sued for assault and battery by his servant upon another, liability must depend either upon proof of an express direction, or upon such facts and circumstances as will imply direction or authority,

and this inference may be drawn by the jury from competent attending facts and circumstances; and if a servant is engaged in the discharge of his duties to the master and is acting for the betterment or well-being of his business, and in so doing wantonly or maliciously injures another, the master is liable to the person so injured. Having given its servant general power to maintain discipline within the bounds of his own discretion, the appellant made itself, under the elementary principles of the law, liable for an abuse of that power. The superintendent was transacting the business of the master when he called respondent to his presence, and the superintendent undoubtedly assumed that he was doing the will of his master when he talked to the respondent and called him to account for what he understood that he had been doing. His object was to promote the welfare of his master's property, and all witnesses agree that the means employed were effective, for there was no further trouble of any kind. In the performance of that which was proper and justified by the circumstances, and to serve no purpose of his own, and without any justification, as the jury has found, the servant allowed his passion to overcome him and maliciously assaulted the respondent.

It would carry the law beyond its legitimate limits to hold that an employee, a third party, must assume the hazard of an abuse of discretion on the part of the overseer and submit without remedy to a blow, whether given in argument as persuasion, or by way of emphasis.

The fault of appellant's reasoning lies in the fact that it has not distinguished between the specified duty of a servant; that is, one who is engaged to do a particular thing in a particular way and which may be very limited, and the scope of a servant's employment

under a general authority and discretion to accomplish a certain result, which in this case, within the fair inferences of the testimony, was to keep the peace as between the crew of workmen and the appellant.

"The specified duty of an employer in such a case may be very limited, but the scope of the employment is as broad as the obligations the master has assumed." *Lakin v. Oregon Pac. R. Co.*, 15 Ore. 220, 15 Pac. 641.

And when a servant goes outside of his employment and wantonly inflicts an injury upon a third person to whom the master owes no duty, the servant is the principal and the employer will not be liable; but where the master has given a servant a general authority, and in the exercise of that authority the servant negligently or maliciously injures another, the act complained of was done in the course of his employment, and,

"the master . . . . will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, and inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion goes beyond the strict line of his duty or authority and inflicts an unjustifiable injury upon another." *Rounds v. Delaware L. & W. R. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597.

See, also, *Waaler v. Great Northern R. Co.*, 22 S. D. 256, 117 N. W. 140, 18 L. R. A. (N. S.) 297.

We are aware that there is a distinction between cases brought against a common carrier, which owes

a greater duty to passengers than a master engaged in private business owes to his employees or to third parties, but it will be noticed by references to the cases just cited that the complaining parties did not bear the relation of passenger to carrier. A recovery was allowed under the general principle of responsibility for an abuse of discretion lodged by the master in the servant. Cooley, Torts (3d ed.) ch. 18; Labatt, Master and Servant (2d ed.) § 2361 *et seq.* While holding the master not liable in the particular case, the rule here governing was recognized by the late Judge Morris in *McQueen v. People's Store Co.*, 97 Wash. 387, 166 Pac. 626.

When the servant is authorized to do the act, the master is liable for its performance. He cannot excuse himself because an authorized act was improperly or unlawfully performed. In other words, so long as the thing the servant is doing is in the furtherance of the master's business, the master must answer for the manner in which the act was done. These and similar statements of the law form the basis of our holdings in *Robinson v. McNeill,* 18 Wash. 163, 51 Pac. 355; *Jones v. Hoge,* 47 Wash. 663, 92 Pac. 433, 125 Am. St. 915, 14 L. R. A. (N. S.) 216; *Linck v. Matheson,* 63 Wash. 593, 116 Pac. 282; *Matsuda v. Hammond,* 77 Wash. 120, 137 Pac. 328, 51 L. R. A. (N. S.) 920; and *Bursch v. Greenough Brothers Co.*, 79 Wash. 109, 139 Pac. 870.

The case of *Matsuda v. Hammond,* 77 Wash. 120, 137 Pac. 328, 51 L. R. A. (N. S.) 920, is relied on by appellant, but it is not contrary to our present holding. As there said, the general liability of the master to answer for the tort of a servant rests in the peculiar character of the employment, which, from its nature, is liable to create disputes and consequent breaches of the peace. It was so in this case, the authority of the superintendent to maintain discipline

and to exercise a general discretion in the performance of his duty excepts the case from the rule in the *Matsuda* case and brings it within the exception there noticed.

The jury returned a verdict for $1,000. The respondent was painfully injured. The assault was malicious, and we are unable to say from the size of the verdict alone that it reflects any passion or prejudice on the part of the jury.

Affirmed.

MAIN, C. J., TOLMAN, MITCHELL, and MACKINTOSH, JJ., concur.

[No. 15047. *En Banc.* November 30, 1918.]

UNIVERSAL MOTOR COMPANY, *Respondent*, v. WILLIAM McGEORGE *et al.*, *Appellants*.[1]

APPEAL (288) — RECORD — STATEMENT OF FACTS — EXTENSION OF TIME. The supreme court will not allow a statement of facts to be supplied, under Rem. Code, § 1730-8, where appellants' first attempt to file or propose a statement was some time after the extreme limit of ninety days fixed by Id., § 393 (MAIN, C. J., TOLMAN, and FULLERTON, JJ., dissenting).

Application filed in the supreme court October 4, 1918, for an order permitting the filing and serving of a statement of facts. Denied.

C. L. Parker and *Ellis, Fletcher & Evans*, for appellants.

Guy E. Kelly and *Thomas MacMahon*, for respondent.

PARKER, J.—Appellants have made application to this court for an order permitting them to file and serve their proposed statement of facts in this case,

[1]Reported in 176 Pac. 331.

or to have their proposed statement of facts, already filed and served therein in the superior court, regarded as a timely serving and filing of the same, to the end that such statement of facts may now be settled and certified by the trial judge. Counsel for appellants invoke in that behalf what they conceive to be the jurisdiction of this court under Rem. Code, § 1730-8.

The judgment appealed from was rendered in the superior court for Pierce county on May 28, 1918. The first attempt to file or serve a proposed statement of facts by appellants occurred on September 5, 1918, when they filed with the clerk of the superior court, and served upon counsel for respondent, their proposed statement of facts. This filing and service, it will be noticed, occurred some time after the extreme limit of ninety days following the rendering of the judgment, as prescribed by Rem. Code, § 393, for the filing and serving of a proposed statement of facts.

A majority of the court are of the opinion that the rule of law announced in *American Fuel Co. v. Benton,* 98 Wash. 26, 167 Pac. 346, is controlling and calls for the denial of appellants' application, if adhered to, and are also of the opinion that the rule of law therein announced should not be overruled. We therefore feel constrained to deny appellants' application.

It is so ordered.

MITCHELL, MOUNT, CHADWICK, MACKINTOSH, and HOLCOMB, JJ., concur.

MAIN, C. J., TOLMAN, and FULLERTON, JJ., dissent.

[No. 14857. Department One. December 4, 1918.]

ALASKA PACIFIC NAVIGATION COMPANY, *Appellant*, v. SOUTHWARK FOUNDRY & MACHINE COMPANY *et al., Respondents.*[1]

CORPORATIONS (263)—FOREIGN CORPORATIONS—ACTIONS—PROCESS—"AGENTS." The president of a local company contracting with a foreign corporation on a time and material basis to install gas engines sold to be installed in this state, is not the "agent" of the foreign corporation for the purpose of service of process; the work of installation being mechanical only.

SAME (263). In such case, a mechanical engineer loaned by the foreign corporation to the local company, under its contract, to supervise the installation of the gas engines, who was paid by and in the service of the local company, is not an "agent" for the purpose of making service of process upon the foreign corporation.

APPEARANCE (4-8)—SPECIAL APPEARANCE—WAIVER. Where, upon hearing a motion under special appearance to quash service of summons, plaintiff requested leave to amend the complaint, objection thereto does not constitute a general appearance waiving the special appearance.

Appeal from an order of the superior court for King county, Frater, J., entered February 11, 1918, quashing service of summons in an action against foreign corporations. Affirmed.

C. H. Hanford and *Piles & Halverstadt (Kerr & McCord,* of counsel), for appellant, contended, among other things, that the cause of action arose in the state of Washington. *Macario v. Alaska Gastineau Min. Co.,* 96 Wash. 458, 165 Pac. 73, L. R. A. 1917E 1152; *Carstens & Earles v. Leidigh & H. Lum. Co.,* 18 Wash. 450, 51 Pac. 1051, 63 Am. St. 906, 39 L. R. A. 548; *Rich v. Chicago, B. & Q. R. Co.,* 34 Wash. 14, 74 Pac. 1008; *Johanson v. Alaska Treadwell Gold Min. Co.,* 225 Fed. 270; *Durham v. Spence,* L. R. 6 Exch. 46; *Oklahoma Fire Ins. Co. v. Kimple,* 156 Pac. (Okl.) 300;

[1]Reported in 176 Pac. 357.

Strawn v. Edward J. Brandt-Dent Co., 71 App. Div. 234, 75 N. Y. Supp. 698; *Maxwell v. Atchison, T. & S. F. R. Co.*, 34 Fed. 286; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518; *United States Graphite Co. v. Pacific Graphite Co.*, 68 Fed. 442; *Bach v. Brown*, 17 Utah 435, 53 Pac. 991; *Shelby Steel-Tube Co. v. Burgess Gun Co.*, 8 App. Div. 444, 40 N. Y. Supp. 871; *Barnett, Haynes & Barnett v. Colonial Hotel Building Co.*, 137 Mo. App. 636, 119 S. W. 471; *Peak v. International Harvester Co. of America*, 194 Mo. App. 128, 186 S. W. 574; *Lammers v. Floyd*, 11 Tex. Civ. App. 473, 33 S. W. 150; *Hosley v. Wisconsin Odd Fellows Mut. Life Ins. Co.*, 86 Wis. 463, 57 N. W. 48; *State v. Woodville*, 13 Tex. Civ. App. 217, 35 S. W. 861; *Carpenter v. American Accident Co.*, 46 S. C. 541, 24 S. E. 500; *Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer*, 197 U. S. 407; *St. Louis Southwestern R. Co. of Texas v. Alexander*, 227 U. S. 218, Ann. Cas. 1915B 77; *Rosenblatt v. Jersey Novelty Co.*, 45 Misc. Rep. 59, 90 N. Y. Supp. 816; *Ithaca Fire Dept. v. Beecher*, 199 N. Y. 429, 2 N. E. 154; *Griesa v. Massachusetts Benefit Ass'n*, 15 N. Y. Supp. 71; *Bruil v. Northwestern Mut. Relief Ass'n*, 72 Wis. 430, 39 N. W. 529; *Thorne v. Milliken*, 157 Pac. (Okl.) 914; *Hilleary v. Skookum Root Hair-Grower Co.*, 4 Misc. Rep. 127, 23 N. Y. Supp. 1016; *Miller v. Burlington & M. R. Co.*, 70 N. Y. 223; 11 Cyc. 662; 40 Cyc. 83.

Allan Cunningham was the agent in fact of the gas company, and if not its agent by appointment was its agent by estoppel. *Barrett Mfg. Co. v. Kennedy*, 73 Wash. 503, 131 Pac. 1161; *Sievers v. Dalles, Portland & A. Nav. Co.*, 24 Wash. 302, 64 Pac. 539; *Lee v. Fidelity Storage & Transfer Co.*, 51 Wash. 208, 98 Pac. 658; *Jenkins v. Penn Bridge Co.*, 73 S. C. 526, 53 S. E. 991; *Norfolk & W. R. Co. v. Cottrell*, 83 Va. 512, 3 S. E. 123; *Arnold v. Huber Mfg. Co.*, 166 Mich. 190, 131 N.

W. 537; *Southern Bell Tel. & Tel. Co. v. Parker,* 119 Ga. 721, 47 S. E. 194; *Beach v. Kerr Turbine Co.,* 243 Fed. 706; *Commercial Mut. Accident Co. v. Davis,* 213 U. S. 245; *Bronson's Executor v. Chappell,* 79 U. S. 681; *Easton v. Littooy,* 91 Wash. 648, 158 Pac. 531; *Mott Iron Works v. Metropolitan Bank,* 78 Wash. 294, 139 Pac. 36; *Violette v. Insurance Co. of Pennsylvania,* 92 Wash. 685, 159 Pac. 896; *Hackett v. Van Frank,* 105 Mo. App. 384, 79 S. W. 1013; *Johnson v. Jones,* 4 Barb. 369; *Board of Trade of Chicago v. Hammond Elevator Co.,* 198 U. S. 424; 2 Herman, Estoppel and Res Judicata, p. 1207; 1 Mechem, Agency (2d ed.), §§ 245, 246; 1 Am. & Eng. Ency. Law (2d ed.), pp. 659, 690.

Frank G. Bryant was the agent of the Southwark Company in doing what that company had contracted to do in this state. *National Condensed Milk Co. v. Brandenburgh,* 40 N. J. L. 111; *Sievers v. Dalles, Portland & A. Nav. Co.,* 24 Wash. 302, 64 Pac. 539; *Lee v. Fidelity Storage & Transfer Co.,* 51 Wash. 208, 98 Pac. 658; *Barrett Mfg. Co. v. Kennedy,* 73 Wash. 503, 131 Pac. 1161; *Jenkins v. Penn Bridge Co.,* 73 S. C. 526, 53 S. E. 991; *Norfolk & W. R. Co. v. Cottrell,* 83 Va. 512, 3 S. E. 123; *Arnold v. Huber Mfg. Co.,* 166 Mich. 190, 131 N. W. 537; *Southern Bell Tel. & Tel. Co. v. Parker,* 119 Ga. 721, 47 S. E. 194; *Beach v. Kerr Turbine Co.,* 243 Fed. 706; *Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer,* 197 U. S. 407.

Ballinger, Battle, Hulbert & Shorts, for respondent Southwark Foundry & Machine Company.

Coogan & O'Connor and *Hughes, McMicken, Ramsey & Rupp,* for respondent Standard Gas Engine Company.

TOLMAN, J.—This action was instituted by the appellant, its complaint alleging that, in March, 1916, it

entered into a contract with the respondent Standard Gas Engine Company, at Seattle, Washington, whereby the latter company agreed to furnish two Southwark-Harris Valveless Oil Engines with equipment, to be installed in a motor ship to be built by appellant, the engines to be manufactured by the respondent Southwark Foundary & Machine Company and guaranteed by the manufacturer, the engines to be completed and shipped from Philadelphia for installation at Seattle within nine months from the receipt of the order, the price and terms of payment being fixed in the contract. It is further alleged that, immediately thereafter, the gas engine company entered into a contract with the Southwark company by which the latter agreed to manufacture the engines for this particular vessel, and guaranteed that the engines would be built along good mechanical lines, with all parts subject to wear adjustable, all wearing surfaces renewable, to replace all defective parts, and that the engines should be installed in such a way as to pass inspection by the United States inspection service, which contract is alleged to have contained the same terms as to delivery and payment as were specified in the contract between the gas engine company and appellant. It is further alleged, that appellant made all payments as required, and fully performed the contract on its part; that, several times during the summer and fall of 1916, appellant notified each of the respondents that the hull of the ship would be ready for installation of the engines by the time specified for delivery in the contract, and warned them that failure to perform the contract within the time specified would cause damages to appellant in a large amount which it would not waive; that the ship was ready for installation of the engines at the time specified, and if the engines had been then installed, she would have been completed

and ready for service by February 1, 1917, but that respondents disregarded the terms of the contract, failed to commence the construction of the engines with business-like promptness, or in time to have them ready for delivery under the terms of the contract, so that the engines were not delivered to the carrier to be transported to Seattle until August, 1917, and could not be, and were not, installed in the vessel until October, 1917. The complaint further alleges what the earning capacity of the vessel would have been if completed February 1, 1917, the consequent loss to appellant, and prays for judgment in the sum of $500,000.

The summons and complaint were attempted to be served in King county, Washington, on the Southwark company by the delivery of copies to one F. G. Bryant as its agent, and upon the gas engine company by delivery of copies to one Allan Cunningham as its agent. Respondents each appeared specially and separately, and moved to quash the service upon it upon the grounds that the person served was not its agent, and also that it was not doing business within this state. Numerous affidavits were filed in support and in opposition to each of such motions, and the trial court having granted each of said motions and entered its order quashing the service, this appeal followed.

The facts from which it must be determined whether Cunningham was the agent of the gas engine company, as we draw them from the record, are that the gas engine company wrote a letter to appellant on July 2, 1917, saying:

"The actual work of installation will probably be done by the Pacific Machine Shop & Manufacturing Company, under the direction of Mr. Allan Cunningham;"

that Cunningham was in fact the president of the Pa-

cific Machine Shop & Manufacturing Company, a corporation, which had a contract with the gas engine company to install these engines on a time and material basis, and that, after the arrival in Seattle of the first engine, a conference was had in which a representative of appellant participated, in the course of which it was agreed that a Mr. Lowe should be employed by the Pacific Machine Shop & Manufacturing Company to superintend the installation of the engines, that all wages should be paid by the Pacific Machine Shop & Manufacturing Company upon time checks issued by Lowe, and that Lowe should issue all requests for supplies, which should be O. K'd. by Bryant, who would also assist Lowe with his technical knowledge and advice; so that the arrangement mentioned as "probable," in the letter above referred to, was modified with the consent and knowledge of appellant.

Likewise as to the facts tending to show that Bryant was the agent of the Southwark company: It appears that Bryant was a mechanical engineer, employed by the Southwark company generally in installing, erecting and testing engines, and in no other capacity, and that, under the contract between the Southwark company and the gas engine company, Bryant was loaned to the gas engine company to supervise the installation of engines in this state which had been manufactured by the Southwark company and by it sold to or through the gas engine company, and was never in this state under any other arrangement, and while so here his expenses were paid by the gas engine company, while his regular salary was paid by the Southwark company.

This court has heretofore had occasion to discuss the question of what constitutes agency for the purpose of the service of summons and complaint upon a

foreign corporation. Not considering the several cases where it was sought to serve the soliciting agent of a railroad company operating no line in this state, or similar cases, and assuming for present purposes (although that may well be doubted) that the installation of the engines in question would be doing business in this state, and further assuming that the cause of action arose in this state, there remains applicable the line of cases represented by the following:

In *Sievers v. Dalles, Portland & A. Nav. Co.*, 24 Wash. 302, 64 Pac. 539, it was held that the purser and wharfinger of the navigation company, in charge of the freight and passengers received and discharged by the navigation company at its dock where it regularly landed in this state and received and discharged such freight and passengers, were such agents.

In *Lee v. Fidelity Storage & Transfer Co.*, 51 Wash. 208, 98 Pac. 658, it was held that one who acted as agent to receive, distribute and store goods and collect the shipping charges, was an agent upon whom service might be made.

In *Barrett Mfg. Co. v. Kennedy*, 73 Wash. 503, 131 Pac. 1161, it was held that one having sole charge, though temporarily, of a warehouse, with authority to ship and receive freight, sell goods, and solicit orders, was such an agent. The court there said:

"It is true that he was not a general agent, but the statute does not require that service in such cases shall be made upon a general or a managing agent; it suffices if it is made upon 'any agent' with representative authority."

We think the reasoning in all of these cases recognizes the general rule, which seems to prevail in most if not all of the states having statutes such as ours, that the agent to be served must be one having some authority to represent the principal, and not a mere

servant or employee. Did either Cunningham or Bryant have any authority to represent, the one the gas engine company, and the other the Southwark company? The only business to be performed was to install the engines under this contract. What was required to so install the engines? The answer must be, mechanical skill only. The skill necessary to read and understand the plans and specifications, if any, and to carry them into execution. More than this, as to the gas engine company, it appears that the work was let by contract to the Pacific Machine Shop & Manufacturing Company on a time and material basis, and in taking such a contract it was bound by the contract and the plans and specifications for the work, with no authority whatever except to carry out the mechanical acts therein required, and could not thereby be clothed with any representative authority, more certainly so since the cause of action did not arise from the performance of this mechanical work. If this be true as to the contracting company, Cunningham, its president, who was not shown to have taken any part in the work, was even further removed from having representative authority from the gas engine company.

What has been said as to the supposed agent of the gas engine company applies equally to Bryant, the supposed agent of the Southwark company. He was a mechanical engineer only, and his duties were purely mechanical. A skilled servant, it is true, and yet no more than a servant. Further, it appears that the gas engine company had contracted with appellant for the installation of the engines, and that Bryant was by it borrowed from the Southwark company for the purpose which brought him to this state, and while so borrowed he was, of course, the servant of the gas engine company until such time as the Southwark company

might recall him, or his duties to the gas engine company might end. He was not, when served, even the servant of the Southwark company, much less an agent having representative authority.

During the closing argument below upon the motion to quash, appellant asked leave to amend its complaint by interlining a correction or change, to which counsel for the Southwark company objected, and it is now urged that such objection constituted a general appearance. The making of the objection was not the asking for affirmative relief, was not inconsistent with the special appearance, and therefore did not waive it.

Finding no error, the judgment will be affirmed.

MAIN, C. J., MACKINTOSH, CHADWICK, and MITCHELL, JJ., concur.

[No. 14859. Department Two. December 4, 1918.]

JOHNSON LUMBER COMPANY, *Respondent*, v. GREAT NORTHERN RAILWAY COMPANY, *Appellant*.[1]

CARRIERS (10, 14) — BILLS OF LADING — AUTHORITY OF AGENT — TRANSFER—RIGHTS OF INNOCENT HOLDER. A railroad company, whose general agent, having power to receive shipments, issued an exchange bill of lading for a forged bill under a mistake of fact, without ascertaining, as he might, whether the goods had been received, is liable to an innocent purchaser for value of the exchange bill, under Rem. Code, § 3385-23, making the company liable to the holder of a negotiable bill for value for damages caused by nonreceipt by the carrier or misdescription of the goods.

Appeal from a judgment of the superior court for King county, Frater J., entered January 14, 1918, upon findings in favor of the plaintiff, in an action to recover the value of property described in a bill of lading. Affirmed.

[1]Reported in 176 Pac. 343.

F. G. Dorety and *H. J. Hagman,* for appellant.
Alexander & Bundy, for respondent.

HOLCOMB, J.—This action was brought to recover the value of a carload of shingles, described in a bill of lading issued by the general freight agent of the Great Northern Railway Company at Seattle. The appellant's defense is that the bill of lading was obtained by respondent's assignor in exchange for a forged bill of lading under a mutual mistake of facts, and that the shingles had never been received or shipped by appellant. To this defense respondent replied that it purchased the genuine bill of lading in good faith for value, without knowledge of the circumstances under which it was issued. The bill of lading called for a shipment of a carload of shingles from Blaine, Washington, to Minnesota Transfer, Minnesota.

The appellant contends that the Federal statute governs, and that the general freight agent at Seattle had no actual or apparent authority to receive goods. We think, however, that the appellant acknowledged the receipt of the goods by the issuing of the exchange bill of lading. At any rate, it made it appear that appellant had received them. It was within appellant's power, through its general agent, before the issuance of its exchange bill of lading, to ascertain whether the goods had been received. Rem. Code, § 3385-23, reads:

"If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of bills of lading, the carrier shall be liable to,

"(a) The consignee named in a non-negotiable bill, or

"(b) The holder of a negotiable bill,

"Who has given value in good faith relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier or a connecting car-

rier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue. . . ."

The general agent had power to receive the shipment anywhere on the carrier's line.

Appellant does not contend that its general freight agent at Seattle had no power to issue an exchange bill of lading. By such issuance of the bill in the state of Washington it made it possible for respondent to believe that appellant had received the goods, and rely upon that belief, and caused the respondent, upon such reliance, to pay value for the bill of lading. It has been held a number of times by this court that he who has made it possible to cause a loss should bear it when otherwise it would fall upon an innocent party.

The judgment is affirmed.

PARKER, J., concurs.

MAIN, C. J., and FULLERTON, J., concur in the result.

ON REHEARING.

[*En Banc.* May 31, 1919.]

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court still adhere to the opinion heretofore filed herein, and for the reasons there stated, the judgment is affirmed.

[No. 14906. Department One. December 4, 1918.]

ROBERT N. DENHAM, JR., *Receiver etc., Respondent,* v. PIONEER SAND & GRAVEL COMPANY, *Appellant,* UNITED STATES FIDELITY & GUARANTY COMPANY *et al., Respondents.*[1]

COUNTIES (46)—HIGHWAYS (33)—CONTRACTOR'S BONDS—RESERVE FUND—RIGHTS OF CREDITORS AND SURETIES. The reserve fund withheld from contractors on county highway work as a trust fund for creditors of the contractor is also for the protection of his bondsmen; and materialmen furnishing supplies cannot participate in such reserve fund, as against the contractor's sureties, unless they served notice of delivery within ten days after the first delivery of the material, as required by Rem. Code, § 1159-1, as a condition precedent to liability therefor on the contractor's bond.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered December 17, 1917, in favor of the plaintiff, in an action to determine conflicting claims to a fund on deposit, tried to the court. Affirmed.

Hughes, McMicken, Ramsey & Rupp and *John P. Garvin,* for appellant.

Spence & Denham, for respondent Denham.

MACKINTOSH, J.—Charles D. Huber had a contract with King county for the construction of a highway in that county. The United States Fidelity & Guaranty Company furnished the required bond. The Securities Construction Company, of which the respondent is now receiver, was a subcontractor for the construction of a portion of the highway. The appellant furnished sand and gravel to the subcontractor which was used in the construction of the highway. The contract between Huber and the county provided for the withholding by the county of twenty per cent of the con-

[1]Reported in 176 Pac. 333.

tract price for the satisfaction of unpaid labor and material claims. Huber made application for the final payment to him under his contract, which was refused for the reason that, at that time, unpaid claims approximating $1,800 were on file with the county auditor, one of these claims being that of appellant. At that time there was due the subcontractor from Huber approximately $1,400 on account of the subcontract. Huber refused to pay the balance due the subcontractor because creditors of the subcontractor had filed the claims referred to, and in order to secure his final warrant from the county, Huber deposited with the county auditor a sum equal to the total amount of all the claims filed, and this action was then commenced by the subcontractor, which by this time had passed into the hands of respondent as receiver, to determine the rights of all concerned in the fund on deposit. The lower court gave judgment to the respondent for the amount of its claim against the principal contractor, to wit, approximately $1,400, subject to the claim in favor of the claimants to the extent of $1,000, and decreed the return of the balance of the $1,800 to Huber; the claim of the appellant to participate in the fund was denied, and from that disposition of the case, the appellant comes here.

It will be borne in mind that the appellant's claim was for an indebtedness of a subcontractor and was not a claim against the principal contractor. The Laws of 1915, ch. 167, p. 525 (Rem. Code, § 1159-1), reads:

"Every person, firm or corporation furnishing materials, supplies or provisions to be used in the construction, performance, carrying on, prosecution or doing of any work for the state, or any county, city, town, district, municipality, or other public body, shall, not later than ten days after the date of the first delivery of such materials, supplies or provisions to any subcontractor or

agent of any person, firm or corporation having a subcontract for the construction, performance, carrying on, prosecution or doing of such work, deliver or mail to the contractor a notice in writing stating in substance and effect that such person, firm or corporation has commenced to deliver materials, supplies or provisions for use thereon, with the name of the subcontractor or agent ordering or to whom the same is furnished and that such contractor and his bond will be held for the payment of the same, and no suit or action shall be maintained in any court against the contractor or his bond to recover for such material, supplies or provisions or any part thereof unless the provisions of this act have been complied with."

When the appellant furnished and sent the gravel to the subcontractor, it gave no notice to Huber as required under the section just quoted, and is relying solely upon the notice and claim which it filed with the county auditor within thirty days after the completion and acceptance of the work. The sum of $1,800, deposited with the county auditor, was intended to, and did, represent the twenty per cent reserve balance provided for in the contract, and we have held that such reserve balance has for one of its purposes the protection of the contractor's bondsmen, who are subrogated to it and for whose benefit it is held in the nature of a collateral security for the obligation on the bond. *Maryland Casualty Co. v. Washington National Bank,* 92 Wash. 497, 159 Pac. 689.

The fact that this twenty per cent is also, and, it may be, principally was, held for the benefit of the laborers and materialmen furnishing work and material for public work, as we have held in the following cases: *State ex rel. Bartelt v. Liebes,* 19 Wash. 589, 54 Pac. 26; *First National Bank v. Seattle,* 71 Wash. 122, 127 Pac. 837; *Maryland Casualty Co. v. Washington National Bank,* 92 Wash. 497, 159 Pac. 689; *North-*

western National Bank of Bellingham v. Guardian Casualty & Guaranty Co., 93 Wash. 635, 161 Pac. 473, yet this fund is a trust fund for creditors and for collectible claims, and is also the bondsmens' security, as indicated.

When we first adopted the doctrine that these reserve funds were trust funds, the only creditors who had a right to recover from such funds were the creditors of the principal contractor, and prior to the enactment of the statute which we have quoted above, the creditors of a subcontractor were without recourse against either the property or bond of the principal contractor, and the only creditors who could participate in the trust fund were those of the principal contractor. By the passage of this act, the condition was changed in this, that the creditors of a subcontractor, by complying with certain conditions, might become creditors of the principal contractor and recover on his bond, and consequently from the trust fund withheld for the payment of laborers and material. In order for the creditors of the subcontractor to have a valid claim against the bond or against the trust fund, they must qualify themselves by complying with the statute. *Rogers v. Fidelity & Deposit Co.*, 89 Wash. 316, 154 Pac. 444. Bondsmen having the right to look to the reserve balance, or trust fund, as we have called it, for the payment of the obligation to creditors who have furnished work or material upon the job, the creditor of a subcontractor must perform those conditions which would give him a right against the bondsmen in order that he might participate in this reserve balance. If this were not true, and if all creditors of the contractor and subcontractor, whether they would have any right upon the bond or not, were allowed to participate in the reserve fund, the bondsmen would lose the entire amount of their security represented

by the reserve fund, which would be paid out to those creditors who had no action against the bond, and that security would cease to exist for the protection of the bondsmen. Until the creditor of the subcontractor has become a creditor within the meaning of the statute, he cannot look to the reserve fund which has been withheld from the general contractor in the nature of an insurance to the bondsmen that, to the extent of that fund at least, the obligation of the principal contractor would be performed.

The judgment of the lower court will be affirmed.

MAIN, C. J., MITCHELL, and CHADWICK, JJ., concur.

[No. 14981. Department One. December 4, 1918.]

MARY HILLEWARE, *Respondent*, v. RENE HILLEWARE, *Appellant*.[1]

DIVORCE (50, 83)—COLLATERAL ATTACK—SUPPORT OF CHILD. Where a decree of divorce did not provide for the maintenance of a child awarded to the mother, and she waged a separate action to recover therefor, a defense therein that the original decree did not properly express the conclusion of the court, asking modification thereof, is a collateral attack upon that decree and cannot be entertained.

Appeal from a judgment of the superior court for King county, Davidson, J., entered January 15, 1918, upon findings in favor of the plaintiff, in an action by a divorced wife to recover the cost of support of a child and for future maintenance, tried to the court. Affirmed.

Walter B. Allen, for appellant.

Griffin & Griffin, for respondent.

[1]Reported in 176 Pac. 330.

MACKINTOSH, J.—In 1915, the plaintiff in this action obtained a decree of divorce from the defendant, which decree awarded her certain property and the custody of their daughter, a child then of the age of fifteen years, the decree being silent as to any provision made for the maintenance of the child. The decree of divorce was appealed from by the defendant, and the judgment of the lower court was affirmed by this court. This action was commenced by the plaintiff, who has, since the decree of divorce, borne the expense of the support of the child, asking a judgment in a sum sufficient to cover one-half of the expenses of such support during the minority of the child.

It is contended by the defendant that, through inadvertence and mistake, the decree in the original divorce action did not express the true decision arrived at by the trial court, and that it was intended that the property awarded to the plaintiff in that action should be used by her in supporting the child, and that the decree should have so provided. This matter was plead as the first affirmative defense. The second affirmative defense was that the matter of the support of the child was *res judicata,* having been a matter involved in a prior suit.

We have held in *Gibson v. Gibson,* 18 Wash. 489, 51 Pac. 1041, 40 L. R. A. 587; *Ditmar v. Ditmar,* 27 Wash. 13, 67 Pac. 353, 91 Am. St. 817; *Hector v. Hector,* 51 Wash. 434, 99 Pac. 13, that, where the decree of divorce does not provide for the maintenance of a child, a separate action can be waged by the mother to whom the custody of such child had been granted, for the purpose of recovering from the father his share of the expense of the maintenance of the minor during its minority. The defendant, recognizing this rule by the affirmative defense interposed by him in this action, attempts to escape its operation by offering to show that

the decree in the original divorce action did not properly express the conclusion of the court, and attempts to have that decree changed in this suit. This effort to reform the original decree is a collateral attack upon that decree; *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757; *Hicks v. Hicks*, 69 Wash. 627, 125 Pac. 945; *Bayer v. Bayer*, 83 Wash. 430, 145 Pac. 433, and cannot succeed. The defendant's remedy, if the decree did not speak the truth, was to have made a direct attack upon it in the action in the court where it was entered. He cannot now be heard to attack it in this manner in this action.

The judgment of the lower court will be affirmed.

MAIN, C. J., CHADWICK, MITCHELL, and TOLMAN, JJ., concur.

[No. 14966. Department One. December 4, 1918.]

NATIONAL BANK OF TACOMA, *Appellant*, v. PUGET SOUND LUMBER COMPANY, *Respondent*.[1]

ESTOPPEL (15, 35-39)—ELEMENTS OF EQUITABLE ESTOPPEL—APPARENT TITLE—SET-OFF—ASSIGNED ACCOUNT. Where a creditor of a logging company, by a written contract, purchased a raft of logs from its debtor, for "spot cash," without any reservation of its right to the logs or an accounting, appreciating the legal effect of the contract, which it may have made with mental reservations for the purpose of obtaining possession of the logs, and the debtor immediately sold the account to a bank holding its notes, the creditor is estopped to withhold the cash or plead a set-off as against the bank; since the doctrine of equitable estoppel applies as in the case of one who negligently causes another to rely on acts to its prejudice; notwithstanding the bank had knowledge of the previous situation of the parties to the sale, both of whom were liable on the notes held.

SAME. In such a case, attaching a draft for acceptance, not called for or mentioned in the contract, is not a suspicious circumstance calculated to put the buyer upon inquiry, as against the unqualified promise to pay cash.

[1]Reported in 176 Pac. 553.

SAME (63-65) — PLEADING — SUFFICIENCY OF ALLEGATIONS. The failure to plead an estoppel is not fatal, in view of Rem. Code, § 1752, requiring the disregard of technicalities and the considering of amendments as made, where both sides in fact relied upon an estoppel and both had set out the facts with the technical fault of omitting to state the legal conclusion of the estoppel; there having been a trial on the merits and no claim of surprise.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered April 20, 1918, upon findings in favor of the defendant, dismissing an action on contract, tried to the court. Reversed.

Hayden, Langhorne & Metzger, for appellant.

F. D. Oakley, for respondent.

CHADWICK, J.—For some time prior to the times hereinafter referred to, the Upper Sound Logging Company had been engaged in the logging business. The company, finding itself in need of additional funds, applied to the Puget Sound Lumber Company for an accommodation of money. Respondent accordingly indorsed two promissory notes aggregating $10,500, which had been executed by the logging company and made payable to the appellant. In consideration of this accommodation, the logging company entered into a contract to sell to respondent, upon its request, all of the logs to be cut from a certain tract of land which it was then logging or had in contemplation for logging. The contract provided that, on all of the logs purchased by respondent, it was to retain $1.50 per thousand and pay it to the Traders Trust Company, which held a mortgage on the land. The remainder of the purchase price was to be applied upon appellant's notes, and in case the logs were sold to any party other than the respondent, the logging company agreed, nevertheless, to pay respondents the sum of $1.50 per thousand feet for all logs so sold, this amount

to be applied in the same way that the retained $1.50 would have been applied if the sale had been made direct to the respondent.

It was agreed that, after the mortgage held by the Traders Trust Company and the accommodation notes which had been executed in favor of the appellant were fully paid and satisfied, the respondent would pay to the logging company the full price of the logs as per a scale of prices therein agreed upon. The contract further provided for certain increases in the agreed price of logs, depending upon the market price of lumber at the time of delivery.

The logging company cut and sold to respondent 4,270,320 feet, and 34,669 feet to a third party with the consent and knowledge of the respondent. It sold logs to the amount of 3,179,319 feet to other persons, firms and corporations without the knowledge or consent of respondent. Deliveries not being forthcoming in amount and quality as respondent thought they should, Mr. Wintermote, secretary of the respondent, went to Vaughn, where the logging operations were carried on. He there found a raft of merchantable logs consisting of 535,245 feet in the boom and ready for delivery. This the logging company had agreed to sell to the Puget Mill Company. Mr. Wintermote protested and claimed the right of his company to have delivery of the logs under the original contract. The logging company refused to so deliver, and after some oral negotiation, the parties executed the following writing:

"Tacoma, Washington, March 2, 1917.
"Messrs. Upper Sound Logging Company
"Tacoma, Wash.
"Gentlemen: Referring to our conversation of this day, we claim the raft of merchantable logs now rafted in your boom at Vaughn, and will send our tug for them today. We agree to pay you for this raft at

the rate of $9.50 per M for the merchantable and $6.25 per M for the No. 2 logs, usual premium for extra lengths, and we will pay you spot cash on delivery of the scale bill and invoice, less two % and also less interest on the amount for 10 days for 7%.

"Yours truly,
"Puget Sound Lumber Company.
"By E. V. Wintermote, Secy.-Treas."

"Referring to above letter, we will at once telephone our boom foreman to close the raft to include all merchantable logs now rafted and to add one section No. 2 logs should there not be 12 sections of merch.

"Upper Sound Logging Co.,
"(In duplicate) By Kay Smith."

Indorsed on the written memoranda is the following:

"For value received the Upper Sound Logging Company hereby assigns the above agreement and the accounts attached hereto unto The Natl Bank of Tacoma.
"Upper Sound Logging Company,
"By John W. McFaddon, President."

There was attached to the contract an invoice for the raft of logs with the price $5,092.87. The logs were thereafter delivered to the respondent. The logging company took the memorandum and invoice, to which it had attached a draft for acceptance by the respondent, to the National Bank of Tacoma and there sold its account for its face value to the appellant.

The appellant brought suit on the contract evidenced by the memorandum. Respondent answered, setting up the facts as we have but briefly outlined them, and claimed damages in the sum of $1,940.17, by reason of the failure and refusal of the logging company to pay to respondent the sum of $1.50 per thousand on all of the logs which had been cut on the land described in the contract, and that it was further damaged in the sum of $3,179.31 by reason of the failure and refusal of the logging company to sell and deliver the

3,179,319 feet of logs which had been cut and delivered to third parties.

The trial judge made findings generally in favor of the respondent. He found an overwhelming amount due from the logging company to the respondent, and accordingly entered a judgment of dismissal against appellant.

The theory upon which the trial judge denied a recovery was that the plaintiff had full knowledge and notice of the original transaction and of the original contract at the time it was entered into, and at all times prior to the assignment of the account sued on, and that it was, therefore, in no position to assert a priority of claim as an assignee of the account.

The appellant was not a party to the original contract. It is a fair presumption of law and of fact that it accepted the notes, which had been signed by respondent for the accommodation of the logging company, upon the faith and credit of respondents' indorsement, but that would not make it a guarantor of the conduct of the logging company, nor would it prevent the logging company and the respondent from settling their differences by a subsequent contract. *Evans v. Oregon & Washington Co.*, 58 Wash. 429, 108 Pac. 1095, 28 L. R. A. (N. S.) 455.

If respondent was willing to waive its right to retain the purchase price, and to apply it, less $1.50 per thousand feet, on the debt to the bank, and for which it had become an accommodation indorser, the bank was at liberty to treat its subsequent contract as a commercial transaction. The agreement to withhold the price was for the benefit of respondent, and the appellant was in no sense a guarantor of the payment of the paper held by it. The fact that appellant knew of the original contract would aid its present position rather than defeat it, for, under the authority of the

case just cited, the contract of March 2 was evidence of "a new contract with the delinquent party."

At the time Mr. Wintermote went to the camp, he found the raft in the boom and ready for delivery to a third party, and it is in evidence that, but for the agreement which was reached between the parties, the raft would have been delivered to the Puget Mill Company and not to respondent. The cause, and the sole cause, for the agreement to deliver it to respondent, so far as we can see from the record, was that, for the particular raft of logs, the respondent was willing to pay "spot cash" upon delivery. It was within his power, and business prudence should have dictated to Mr. Wintermote, that he save his rights under the original contract by timely reference, if he then had it in mind to do so. The law will hardly permit one who, notwithstanding prior transactions or prior contracts, enters into a specific contract for the immediate delivery of a specific article to be paid for in a certain amount in "spot cash," with specific deductions or discounts (implying that there were no other adverse claims), to repudiate his promise, after an assignment of the account, and assert a right under a contract which, if it had been insisted upon at the time, would have avoided the present controversy. 34 Cyc. 750.

Respondent combats the equitable estoppel which arises *prima facie* against it upon several grounds: first, that the assertion, "We claim the raft of merchantable logs now rafted in your boom," is a sufficient declaration of an intention to claim under the original contract; second, that, in the negotiations had between the parties, it was not decided whether respondent would pay $2,000 cash upon delivery or whether it would accept a draft for the whole amount; and third, that it now transpires that the respondent

had been deceived and that it did not then know that the entire tract of land had been logged, and that the logging company had not paid the stipulated price of $1.50 per thousand to the bank on logs sold by it to third parties.

We are not concerned with the differences between the logging company and the respondent, but only with the right of the appellant to recover upon the contract made on the 2d day of March. In cases of this kind, the first question is whether the intent of the party sought to be charged to pay in any event can be reasonably inferred.

"Now, we take the rule to be well established that where a sale is made, and where the terms of the sale are cash, this, among merchants, is understood to mean cash on the delivery of the goods; that in the commercial world there is no difference and no distinction between a cash sale, or what is known as 'spot cash sale,' and a sale for cash on delivery. All of the evidence in this case shows, and in fact the proposition is indisputed, that this is what is known in commercial parlance as a 'spot cash sale'; that is, by the terms of the sale the vendee was to pay cash for the goods upon the delivery of the same." *McIver v. Williamson-Halsell-Frasier Co.*, 19 Okl. 454, 92 Pac. 170, 13 L. R. A. (N. S.) 696.

That Mr. Wintermote appreciated the legal effect of his contract and made it with reference to the conditions as he found them at the camp is quite certain, although it is only fair to say that he may have entertained some mental reservations and may have intended the contract of March 2d as a means of obtaining possession of the raft of logs, intending thereafter to assert his present claims against the payment of the money. Notwithstanding the positive character of the promise, he says:

"I sent Mr. Buchanan over there immediately after I signed this letter, and he 'phoned me after the first

visit not to pay it because they were not logging on this tract at all, but were logging on the Puget Timber Company land. I refused to pay the bill for this raft, and I notified them, too. The moving reason why I went over to where they were logging was to find out what the trouble was. I found out to my satisfaction. I found they were selling to parties other than us. After coming home, I signed this letter with the understanding that I have given you. I did not know what they wanted with that letter, only the assurance that we were to pay for these logs. I knew that our contract called for the payment of a certain price. Q. You said, if I understand you correctly, that, when you came back from there (referring to the camp of the Upper Sound Logging Company), you knew you were not getting all the logs they turned out. A. Yes, sure, I did. Q. You knew then, as a business man, that they were selling to somebody else? A. That is what I gleaned from it. Q. Yet in this letter under date of March 2, 1917, you say, 'We will pay you spot cash on delivery of the scale bill and invoice, less two per cent,' don't you? A. Yes, sir. Q. Now, what is the reason for that? A. I didn't get the chance. They never came to me. They slipped into the bank and cashed that letter. They didn't come to me at all. Q. You issued the letter then with knowledge on your part that they had been selling logs to third parties? A. Yes, sir. I will answer that yes, but I put this proviso to it when Mr. Smith brought me that letter, they were to go ahead and give me those logs under the contract. Q. Why didn't you put that in the letter? A. I don't know why I didn't, particularly; but Mr. Smith won't deny it."

Respondent knew, at the time the contract sued on was signed, that the logging company was claiming that it had not paid for a raft of logs previously delivered, that the logging company was insisting on a cash sale, and that it was hard up and in need of money. It knew that there had been some conversation about the time and manner of payment, yet it put forth a

writing which made no reservations and which might, and as it transpires did, pass in the customary channels of trade into the hands of a third party and for value. The principle governing has been heretofore declared by this court.

"Estoppel is an equitable proceeding, or speaking more accurately perhaps, it is the equitable result of a wrongful proceeding or act, a reliance upon which would, in the absence of an estoppel, work an injustice to an innocent person. At the common law estoppel was founded on deeds and records of courts, but estoppel in equity is estoppel *in pais*. The principle now applies because it has been found that the common law rule was too narrow and inadequate for the attainment of justice under the multiplied transactions of modern times, and hence the equitable estoppel of the present day. The well-understood idea of equitable estoppel is that, where a person wrongfully or negligently by his acts or representations causes another who has a right to rely upon such acts or representations to change his condition for the worse, the party making such representations shall not be allowed to plead their falsity for his own advantage." *Carruthers v. Whitney,* 56 Wash. 327, 105 Pac. 831, 134 Am. St. 1114.

And we may say of the defenses set up here, as was said in the case of *Fuller & Co. v. Longmire,* 97 Wash. 254, 166 Pac. 623: "We may observe that they relate in the most part to questions arising in the original [contract] action and not to questions arising between respondent and appellant."

Much is made in the briefs and in the oral argument over the fact that, at the time the bank bought the account, a draft was attached for acceptance, and that the agent of the logging company had called at the office of the respondent to have it accepted, and failing to find any one in authority, he had gone to the bank, and that the executive officer of the bank had

endeavored to reach respondent by telephone, and failing in this, had nevertheless purchased the account. But this, we think, is not sufficient to deprive appellant of its right to recover. The contract did not provide that the obligation of respondent should be further evidenced by the formality of a draft and acceptance. The contract being complete upon its face, the attachment of a draft by the seller was not a suspicious circumstance or one calculated to put a buyer upon inquiry. It certainly did not so operate as against the unqualified promise to pay in cash upon presentation of the scale bill and invoice.

Finally, respondent contends that the appellant cannot maintain its action, no estoppel having been plead in its reply. This case presents a singular aspect, in this: appellant sets up its cause of action, alleging that it had bought the account for value and in good faith and asked judgment. Respondent answered, admitting the execution of the contract, but denying that it had any knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff had bought for value and in good faith. It then proceeded to set up, in several separate affirmative defenses, its claims of damage against the logging company. Plaintiff replied, denying all of the allegations tending to support the claim of damages. The case went to trial, and the entire relationship of the several parties to the original contract, as well as the subsequent contract was gone into. During the course of the trial, counsel for appellant objected to all testimony concerning damages to the respondent arising out of its relationship to the logging company. The testimony went in generally without objection. It will thus be seen that both sides, in fact, relied upon an estoppel, the appellant contending that respondent is estopped to plead an offset as against its absolute

promise, and the respondent contending that the appellant is estopped because of its knowledge of the prior contract and its relation to the debt then owing by the logging company to the bank. The facts were pleaded on both sides, and each pleading has the technical fault of omitting to put in words the legal conclusion that the opposing party is, by reason of the facts, estopped to assert its claim.

We think the case falls within the rule of our statute, Rem. Code, § 1752, commanding us to hear and determine this case upon the merits, disregarding all technicalities and considering all amendments which could have been made as made. In this case it is not contended that there was any surprise, nor can it be contended that respondent was misled and, for that reason, prevented from presenting its case fully to the court. *Matzger v. Arcade Bldg. & Realty Co.*, 80 Wash. 401, 141 Pac. 900, L. R. A. 1915A 288; *Sjong v. Occidental Fish Co.*, 78 Wash. 4, 138 Pac. 313.

Notwithstanding the rule under the code, to which we have firmly adhered, that an estoppel to be available must be plead affirmatively, and the statute law to which we have referred, a like rule has been asserted in the absence of statute where it can be said that the estoppel inheres in the cause of action or in the defense. 8 Standard Ency. of Procedure, 689; *Bremen Sav. Bank v. Branch-Crookes Saw Co.*, 104 Mo. 425, 16 S. W. 209. So that, if it were not for our statute, the present contention of respondent could be overruled under the sanction of respectable authority.

The judgment is reversed, with directions to enter judgment in favor of appellant for the balance due upon the contract.

MAIN, C. J., TOLMAN, and MITCHELL, JJ., concur.

[No. 15022. Department One. December 6, 1918.]

THE STATE OF WASHINGTON, *on the Relation of Chas. H. Lilly Company, Plaintiff*, v. AUGUSTUS BRAWLEY, *Judge, etc., Respondent.*[1]

CERTIORARI (3)—REMEDY BY APPEAL. Certiorari does not lie to review or supersede an order vacating or refusing a temporary restraining order where there was no finding of insolvency, since appeal from such an order is expressly forbidden by Rem. Code, § 1716.

SAME (3, 4)—ADEQUACY OF REMEDY BY APPEAL. Upon breach of a contract to sell seed of special quality to a seed company, the damage which may result from the seed's being marketed by others is incidental only to the loss of profit, and too remote to call into action the extraordinary writ of certiorari to secure injunctive relief, in the absence of a finding of insolvency of the defendant.

Application filed in the supreme court September 24, 1918, for a writ of certiorari to review an order of the superior court for Skagit county, Brawley, J., dissolving a temporary injunction, and for an order of supersedeas. Denied.

A. R. Hilen and *Grinstead & Laube*, for relator.

Hans Bugge and *Thomas Smith*, for respondent.

TOLMAN, J.—The relator, on the 11th day of September, 1918, commenced an action in the superior court of the state of Washington for Skagit county, entitled, The Chas. H. Lilly Company, a corporation, plaintiff, v. Lars Johnson and Harold Knudson, defendants, being cause No. 8959 of the records of said court, filing upon that day its complaint, in which, among other things, it alleged:

"(2) That the plaintiff now is, and for many years last past has been, engaged in procuring the raising

[1]Reported in 176 Pac. 337.

of seeds of various kinds, to be marketed in appropriate markets over the entire markets of the United States, to be used for the purpose of seeding lands for the raising of crops; that, for said purpose, plaintiff, for many years last past, has been engaged in procuring areas of land suitable for the raising of different varieties of seeds for such purpose, and, in particular, in Skagit county, has procured land suitable for the raising of cabbage seeds of different varieties, including the 'All Season' variety for such purposes. That plaintiff's seeds have acquired a wide reputation throughout the United States for their purity, uniformity and vitality for seed purposes. That such reputation has been acquired only by diligent effort in the raising, or the procuring of the raising, of good, pure, vital seeds.

"That the contract of March 15, 1917, and its subsequent amendment as hereinafter pleaded, was made and entered into by the plaintiff pursuant to its custom and purpose as hereinafter set forth, all of which is and at all times hereinafter mentioned was known to the defendants and each of them.

"That pursuant to said purpose, for the protection of plaintiff's reputation, trade-name and good will in such pure seeds as was developed over a period of years, it is and has been necessary, fair and equitable, that the seeds raised from seed furnished by said Chas. H. Lilly Co. should be distributed and distributable only by plaintiff, all of which is, and at all times hereinafter mentioned was, known to defendants herein. That for the protection of such necessary, fair and equitable purposes, said agreement of March 15, 1917, as amended, provided that the defendant Lars Johnson should raise seed of the above named variety on said defendant's land for no other person than plaintiff, and said defendant Lars Johnson therein agreed to plant and raise such seed exclusively for plaintiff.

"(3) That defendant Lars Johnson now is, and at all times hereinafter mentioned was, occupying and in possession of a certain tract of agricultural land in Skagit county lying in the vicinity of Telegraph and

Swinomish Sloughs, the exact legal description of said tract of land being to plaintiff unknown.

"(4) That, on or about the 15th day of March, 1917, plaintiff and the defendant Lars Johnson, in consideration of all the mutual obligations therefrom arising, made and entered into a certain agreement in writing, a copy of which is attached hereto, marked Exhibit 'A,' and hereby made a part hereof.

"(5) That, on or about the 7th day of May, 1917, the plaintiff and the defendant Lars Johnson, in consideration of all the mutual advantages and obligations to arise therefrom, amended said agreement of March 15, 1917, by certain writings, copies of which are attached hereto and marked respectively exhibits 'B' and 'C,' and hereby made a part hereof.

"(6) That in conformance with the obligations of said agreement as amended, plaintiff furnished seed sufficient, and in excess of actual necessary requirements, to said Lars Johnson to plant an area of 25 acres or more; that such seed was placed in the ground and cultivated in accordance with said agreement. As plaintiff is informed and believes, the total area planted with said seed on said farm was in excess of 30 acres or more; that as plaintiff is informed and believes, by the said defendant Lars Johnson, all of the cabbage seed planted by said defendant on said farm since the date of such contract was seed furnished by plaintiff under the terms of said agreement as amended.

"(7) That the crop of cabbage seed raised and matured under and pursuant to said agreement has now been harvested and is now in possession of defendant Lars Johnson. That the amount of said seed so harvested and in possession of said defendant is to plaintiff unknown, but plaintiff is informed and believes it is in the approximate amount of 12,000 pounds.

"(8) That, relying upon said agreement with defendant Lars Johnson, plaintiff entered into contracts selling all of said seed to be raised under the agreement hereinbefore referred to and is now obligated to deliver said seed to the purchasers under such agreements, said contracts having been made at the time

when the market price of said seed was approximately the same as existed at the time of making the agreement with Lars Johnson hereinbefore referred to.

"That the defendant Lars Johnson has notified plaintiff that he refuses, and will continue to refuse, to deliver to plaintiff all of the seed so raised under said agreement, and that he intends to retain said seed for the purpose of disposing of the same to other parties than plaintiff.

"That, in such event, plaintiff will be unable to obtain similar or seed of the same variety, purity, quality and vitality as the seed so raised under said agreement, and thereby will be unable to fulfill and perform its obligations to deliver such seed to other parties as hereinabove set forth, and by reason thereof will sustain irreparable and lasting damage under said agreements and to its reputation and business as hereinbefore described."

And further alleged that the defendant Harold Knudson claims and asserts an interest in said crop of seed the exact nature of which is to the plaintiff unknown, and praying for an order restraining and enjoining the defendants, and each of them, from marketing and disposing of said crop of seed, for a final decree requiring the defendants to deliver the said crop and the whole thereof to the plaintiff under the terms of its said agreement, and for general relief.

Upon the filing of the complaint, the relator, as plaintiff in said cause, procured a temporary restraining order to issue directed to both of said defendants, returnable on September 18, 1918. On the last named date, the cause came on for hearing before the respondent, as judge of said superior court, upon the order to show cause why said restraining order should not continue in full force and effect pending the litigation, and the defendants, after having moved to strike from the complaint, which motions were denied, and after having demurred to the complaint, which demurrers

were overruled, answered; and the defendant Knudson, after appropriate denials, alleged in his answer that,

"Long subsequent to the month of March, 1917, that he leased to one Lars Johnson twenty acres of land upon the express understanding and agreement that he was to plant the same to cabbage for the purpose of raising cabbage seed, and that he was to care for, look after, harvest and thresh the crop and to deliver to him at the time of threshing one-half of all the seed sown, grown, raised, harvested and threshed from said land, and in pursuance of said agreement the said Johnson entered onto a twenty-acre tract of land belonging to this defendant, and during the spring of 1917 planted the same to cabbage plants and cared for the same for said year and the succeeding year of 1918, and that he harvested and threshed the said crop and delivered to this defendant one-half of the cabbage seed so grown and raised, at the time of threshing thereof, as rental for said premises, and he now has said share of said cabbage seed in his possession and owns the same, and he denies each and every other allegation not herein admitted, alleged and set forth in said paragraph 10."

After the answers were filed, the hearing proceeded, and the plaintiff therein offered certain affidavits and oral testimony tending to establish the allegations of its complaint, and called as a witness the defendant Harold Knudson, whose testimony was consistent with that portion of his answer which has been quoted. The respondent judge thereupon announced his decision that the restraining order, as to the defendant Knudson, would be dissolved. Whereupon the plaintiff asked that the order dissolving the injunction as to the defendant Knudson should be superseded for a sufficient time to permit the plaintiff to apply to this court for the purpose of reviewing such ruling, and accordingly the relator has applied for a writ of review and an order of supersedeas.

The respondent, in his return, sets up that there is no allegation in the original complaint of the relator alleging that the defendants in the original action, or either of them, are insolvent, or in imminent danger of becoming insolvent, and that no testimony was offered by the relator in the original action to the effect that the defendants, or either of them, were insolvent, or in imminent danger of becoming insolvent, and that the respondent, as judge of said court, was not requested to make any finding regarding the solvency or insolvency of said defendants, or either of them, in the proceeding referred to.

The statute, Rem. Code, § 1716, provides:

"Any party aggrieved may appeal to the supreme court in the mode prescribed in this title from any and every of the following determinations, and no others, made by the superior court, or a judge thereof, in any action or proceeding.

"(3) From an order granting or denying a motion for a temporary injunction, heard upon notice to the adverse party, and from any order vacating or refusing to vacate a temporary injunction: Provided, that no appeal shall be allowed from any order denying a motion for a temporary injunction, or vacating a temporary injunction unless the judge of the superior court shall have found upon the hearing, that the party against whom the injunction was sought was insolvent."

The relator relies upon the case of *State ex rel. Davis & Co. v. Superior Court*, 95 Wash. 258, 163 Pac. 765, in which case it appeared that the relator had commenced an action in the superior court against Vincent D. Miller and Vincent D. Miller, Incorporated, and others, seeking injunctive relief forbidding them from soliciting business from customers or clients of the relator, and from making use against the relator of any confidential information gained by them (not

including the corporation) while connected with the relator in confidential capacities. In that case the lower court denied a temporary injunction, and found that the corporation defendant was insolvent, but refused to pass upon the question of the solvency of the individual defendants, although having expressed orally the opinion that they, or the principal ones, were in fact insolvent. In that case the relator sought a review by this court of the issue of insolvency, and an order of supersedeas pending the trial upon the merits, and, since the facts clearly showed insolvency, this court entertained jurisdiction, found the insolvency, and issued the order of supersedeas, being impelled thereto, no doubt, by the facts in that case, which showed that the principal defendants, other than the corporation, had been confidential employees of the relator, knew all of its business and customers, its methods of doing business, and the matters shown upon its books, and had severed their relations with the relator, organized a corporation, and proceeded to solicit the business of the relator's customers. Manifestly, the defendants being insolvent, if the solicitation were permitted to continue and the defendants enticed away the relator's customers, no adequate remedy would remain to the relator if he prevailed upon the merits in the original action. We think this case may be readily distinguished upon the facts from the *Davis* case. First, there was in this case no allegation of insolvency, and no proof thereof, so that, under the statute, an appeal is directly and positively forbidden, and relator is attempting to obtain appellate relief by this proceeding, thus avoiding the force of the statute; while in the *Davis* case, the right of appeal in fact existed, but was not available to the relator because of the error of the trial court in refusing to

find insolvency. Second, in the *Davis* case, that which was being taken away from the relator could not be readily measured by money value, while in this case the matter in controversy, stripped of all surplusage, is simply and solely a quantity of cabbage seed, which is a commercial commodity and has a market value, and which the relator is trying to recover in the original action for the purpose of selling and delivering it to its customers. Manifestly, therefore, if it should prevail upon the merits as against the defendant Knudson, and he should fail, refuse or be unable to deliver the commodity in question, the value thereof could be readily ascertained from the market price and a judgment be entered accordingly. And since there is no allegation, proof or suggestion of insolvency upon the part of the defendant Knudson, it is to be presumed that the judgment would be collectible.

This court has uniformly held that an extraordinary writ will not issue to review or supersede an order denying a temporary injunction, which by statute is not appealable, unless there is a finding of insolvency, because the legislative intent is that such orders shall be reviewed only on appeal from the final judgment. *State ex rel. Young v. Superior Court,* 43 Wash. 34, 85 Pac. 989; *State ex rel. Mohr v. Superior Court,* 54 Wash. 225, 103 Pac. 17; *State ex rel. Coombs v. Superior Court,* 69 Wash. 439, 125 Pac. 779.

Nor do we think that the allegations of relator's complaint with reference to the time it has been in business, the methods it has employed to establish a reputation for its product, or the fact that these seeds may reach the market without passing through its hands, in any way change the gist of the action. The damage, if any, which may result to relator from these seeds being marketed by others than itself, aside from

the loss of its profit in handling the seed, would be incidental only, and too remote to call into action the extraordinary writ which is here sought.

Writ denied.

PARKER, MACKINTOSH, CHADWICK, and FULLERTON, JJ., concur.

[No. 14546. *En Banc.* December 9, 1918.]

THE STATE OF WASHINGTON, *Appellant*, v. TWENTY BARRELS OF WHISKEY, *Respondent*.[1]

TRIAL (157)—BY COURT—FINDINGS AND CONCLUSION—CONSTRUCTION AND OPERATION. Under Rem. Code, § 368, providing that findings of the court upon the facts shall be deemed a verdict, the judgment must accord with the findings, which have the effect of a special verdict and control inconsistent conclusions of law.

INTOXICATING LIQUORS (53)—SEARCHES AND SEIZURES—RECLAIMING SHIPMENT—EXPIRATION OF PERMIT. After a shipment of intoxicating liquor to a druggist has been seized as contraband, the time limit for delivery having expired, the shipper cannot rescind the sale, interrupt the transit, and claim the liquor for reshipment out of the state, in view of Rem. Code, § 6262-17, providing that the permit shall be void at the expiration of thirty days, and making it unlawful for the carrier to transport any liquor without a valid permit.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered October 9, 1917, upon findings in favor of the defendants, ordering the return of intoxicating liquors seized, after a trial to the court. Reversed.

Alfred H. Lundin, Frank P. Helsell, and *Joseph A. Barto,* for appellant.

Jay C. Allen, for respondent.

HOLCOMB, J.—The police department of Seattle, pursuant to a search warrant, on May 11, 1916, seized

[1]Reported in 176 Pac. 673.

fifteen barrels of whisky at the Pacific Coast Steamship Company's dock, consigned to J. J. Kelly Drug Company, Seattle. Before the justice of the peace, Louis Tauggig & Company claimed ten barrels of the whisky, and Fleischman Clark Company claimed the other five barrels. On January 25, 1917, the justice court ordered the liquor destroyed. The claimants appealed to the superior court, where there claims were upheld and the liquor ordered returned to them, on October 9, 1917. The trial court made findings of fact and conclusions of law and entered judgment.

The state prosecutes this appeal, assigning errors in the court's making the three conclusions of law and in granting judgment in favor of claimants. There is no statement of facts, bill of exceptions, or exceptions to the findings of fact in the record. The findings of the trial court must therefore be presumed to be correct. The findings of fact correspond with the verdict of the jury. In Rem. Code, § 368, it is stated that "The finding of the court upon the facts shall be deemed a verdict." While it is proper practice to make separate conclusions of law, yet the findings of fact must be considered as controlling the conclusions of law, and the judgment must accord with the findings; and if it does so accord, it is immaterial that it is inconsistent with the conclusions of law. The findings of fact must be given the force of a special verdict, and the conclusions of law that of a general verdict. A special verdict controls the general one. *Gerhard v. Worrell,* 20 Wash. 492, 55 Pac. 625.

Findings Nos. 4, 5, 6, and 7 state in substance that the county auditor of King county, on April 6, 1916, issued a large number of liquor permits to J. J. Kelly Drug Company; that a number of these permits were sent to claimants; that each barrel of whiskey had one of these permits attached to it in a

conspicuous place, and was marked in plain letters, "This package contains intoxicating liquors," and all of the whiskey was consigned by the claimants to J. J. Kelly Drug Company, Seattle, Washington; that the shipments of the whiskey made by claimants were received and accepted by the Pacific Coast Steamship Company in San Francisco for transportation to Seattle. (8) That, in making the sales and shipping the whiskey, claimants relied upon the permits. (9) That J. J. Kelly paid nothing on account of the purchase of the liquors. (10) That news of the police's wrecking J. J. Kelly Drug Company reached claimants May 8, 1916, when for the first time they learned that the whiskey was about to be used unlawfully; that thereupon they immediately rescinded the sale and notified the Pacific Coast Steamship Company to stop the goods in transit and return the whiskey to them; that no part of the whiskey had been delivered to J. J. Kelly Drug Company, but it was in possession of the steamship company and was in transit. (11) That the steamship company did stop the goods in transit and held the same in its possession for the sole purpose of returning it to the shipper. (12) That at no time subsequent to May 8, 1916, was any of the whiskey intended to be kept in the state of Washington, nor was it out of the possession of the steamship company as common carrier of interstate commerce, but it was held for the sole purpose of re-transporting it to San Francisco; that police officers seized the whiskey on May 11, 1916, while at Pier D, Seattle. (13) Claimants appeared before the justice court and made claim to the whiskey so shipped by them. (14) That the value of the whiskey at the time of seizure was $817.83 for the ten barrels, and $375.25 for the five barrels. (15) That at no time was any of

the whiskey kept in the state of Washington for the purpose of sale, barter, exchange, giving away, or for any purpose contrary to the laws of Washington, but was in the state in the possession of a common carrier in transit for the purpose of being returned to the state of California.

It does not appear that the whiskey had been relabeled for San Francisco, but it was addressed to J. J. Kelly Drug Company, Seattle, Washington. The permits attached were issued April 6, 1916. Section 17, ch. 2, Laws of 1915, p. 12 (Rem. Code, § 6262-17), provides that any registered druggist or pharmacist actually engaged in business within the state, desiring to transport or ship any intoxicating liquor within the state, shall first secure from the county auditor a permit therefor, which permit can only be used for one shipment "and shall be void after thirty days from the date of issue." It is manifest from this statute that the permits were void on May 6, 1916, and in legal effect as though the shipments had no permits. Such being the case, the liquor was contraband—subject to seizure, forfeiture and destruction after May 6, 1916, at any place in the state of Washington, while in transit. The statute does not provide that claimants may obtain a permit for the purpose of reshipping the liquor out of the state, even should we hold that the sale was properly rescinded. Section 18, ch. 2, Laws of 1915 (Rem. Code, § 6262-18), makes it unlawful for any transportation company "to knowingly transport or convey any intoxicating liquor within this state, without having a permit issued by the county auditor for the transportation of such intoxicating liquor affixed in a conspicuous place to the parcel or package containing the liquor." This does not mean a void permit.

In *State v. Great Northern R. Co.*, 101 Wash. 464, 172 Pac. 546, we said:

"To hold that the date of the shipment, and not the date of its apprehension by the officer, shall determine whether the goods were being transported within the period of time fixed by the permit would be to shift upon the officer a burden that would effectively prevent in most cases a seasonable enforcement of the law. . . . . The facts concerning the date of the shipment, the length of time in transit and the lines over which it had been routed, all rest with the shipper and the carrier. The officer has no means of acquiring them, but, under the principle contended for by appellants, must make the seizure at his peril, notwithstanding the self-evident fact that the goods were in transit by virtue of a permit that *prima facie* afforded the carrier no lawful authority for their transportation. Under such circumstances, it is just as unreasonable to assume that the officer could effectually enforce the law, as it would be unjust to censure his dereliction of duty. Clearly, it was the purpose of the legislature in making the permit void when the allotted time had elapsed, to facilitate, rather than to hinder and delay, the enforcement of the law."

The seller of any goods which may be devoted to an illegal use or a dangerous object should have the legal right, which courts probably would declare, to rescind the sale, interrupt the transit, and reclaim the possession of the goods before reaching the intended buyer, on learning that the goods are to be devoted to such illegal or dangerous use. But he must act promptly on learning of the illegal intention of the buyer, and before the lawful authorities have interposed under the police power of government and seized the goods. After such seizure under valid proceedings, it is too late for the seller to interrupt the carriage and delivery by rescinding the sale, no matter how worthy the purpose in so attempting.

Here the sale was lawfully made and carriage of the goods lawfully commenced under the license of permits required by law which would expire on May 6. After such expiration and before delivery of the goods to the buyer, the state discovered the illegal purpose of the purchase and interposed its strong arm before the seller had rescinded the sale and retaken the goods. They were the subject of seizure before delivery to an illegal buyer.

Claimants cannot insist that the whiskey was an intended sale and shipment but that, in event the police authorities seized it, they would be entitled to immunity and a return of the whiskey because they had rescinded the sale. Such a holding would plainly evade the purposes of the law. The whiskey was contraband at the time claimants attempted to rescind. This is not a criminal prosecution against individuals, but a *rem* proceeding against contraband goods. If the whiskey is contraband, it matters not whether the owners are in California or in this state. They cannot now have immunity for the goods because they rescinded the sale at a time when the shipment was unlicensed and contraband.

The judgment not being in accord with the law and the facts, it must be reversed. It is so ordered.

MITCHELL, J., concurs.

MAIN, C. J., FULLERTON, PARKER, and TOLMAN, JJ., concur in the result.

MACKINTOSH, J., took no part.

[No. 14713. *En Banc.* December 9, 1918.]

J. K. LUMBER COMPANY, *Respondent*, v. E. P. ASH, *Appellant*.[1]

TAXATION (75)—ASSESSMENT IN WRONG NAME—NOTICE TO OWNER. An assessment of personal property in the wrong name does not invalidate the tax, where the owner knew thereof and had been doing business and paying taxes in such name.

SAME (131)—SALE OF PERSONALTY—NOTICE. A personal property assessment and tax sale of a logging company's "railroad" and equipment is not void as embracing real estate, where the railroad referred to was upon leased land.

SAME (131)—PERSONALTY—DISTRAINT—POSSESSION. To distrain for personal property taxes upon a railroad some miles in length, locomotives, cars, cable and equipment at different places, the sheriff need not, under Rem. Code, § 9223a, take physical possession, or do more than examine the property and give and post the legal notices.

SAME (131)—SALE OF PERSONALTY—INADEQUACY OF PRICE. Inadequacy of price is not ground for setting aside a regular sale of personal property for delinquent taxes.

SAME (131)—SALE OF PERSONALTY — IN PARCELS — PRESENCE OF PROPERTY. A sale of the personal property of a logging company consisting of a railroad, locomotives, cars, and equipment at different places is not void because not made in parcels and because it was not exhibited to purchasers, where bids in parcels were called for and none received, and where there was no one place where it could all have been collected for exhibition with any likelihood of attracting more bidders.

Appeal from a judgment of the superior court for Skamania county, Back, J., entered September 14, 1917, in favor of the plaintiff, in an action to vacate a tax sale, tried to the court. Reversed.

G. E. Lovell and *E. E. Shields*, for appellant.

Platt & Platt, Douglas, Lane & Douglas, and *Guy C. H. Corliss*, for respondent.

[1]Reported in 176 Pac. 550.

MACKINTOSH, J.—The respondent seeks to have set aside a sale of its personal property for delinquent taxes for the year 1916.

The company has been for some years the owner of logging lands on Hamilton creek, Skamania county, this state, together with a logging railroad and equipment of various kinds used in its logging operations. These operations were carried on by the respondent under various names, used more or less interchangeably, viz; Hamilton Creek Timber Company; Kribs Timber Company (Kribs being president of respondent); J. K. Kribs and J. K. Lumber Company. The principal office of the company was located in Portland, Oregon. The use of the name Hamilton Creek Timber Company resulted from a transaction whereby the Hamilton Creek Timber Company, by one Dodge, its virtual owner, some years before passed into the control of respondent. This transaction was never evidenced by any public record; that is, no real or chattel mortgage, or bill of sale, or conditional sale contract, or any other instrument evidencing the transaction, was ever filed with any officer of Skamania county. The property of the respondent for the years 1915 and 1916 was carried on the tax rolls in the name of the Hamilton Creek Timber Company, the personal property being described as follows:

"Donkey and logging engines, pile drivers, hoisting engines, and all railroad equipment, etc., belonging to and under the control of Hamilton Creek Timber Company."

On March 1, 1917, the personal property taxes for the years 1915 and 1916 had not been paid, and a suit was pending wherein the respondent was endeavoring to have the 1915 taxes reduced. The assessor of Skamania county, before making up the tax list for 1916, had visited Mr. Kribs in Portland and talked with him

in regard to respondent's personal property. The respondent's real property taxes for the year 1916 had been paid by a Mr. Franks, who was a representative of the bondholders of respondent. On March 1, 1917, the treasurer of Skamania county handed to the sheriff of that county a notice to distrain for the taxes of 1915 and 1916. After receiving the notice, the sheriff sent to Mr. Kribs in Portland a delinquent personal tax notice in the form of the usual post card, and a deputy sheriff also called up Mr. Franks on the long distance telephone at Portland and informed him that personal property taxes for the years 1915 and 1916 were due and that the property would be sold for these taxes. Shortly after these notices had been given, attorneys representing the respondent came to Skamania county and settled the suit involving the 1915 personal property taxes. There is a dispute in the testimony as to whether at that time these attorneys entered into any discussion in regard to the personal property taxes for 1916. These latter taxes remaining unpaid, the sheriff issued a notice of distraint, a copy of which was mailed to the Hamilton Creek Timber Company at Hamilton creek, and a deputy sheriff visited Hamilton creek and examined the property. The sheriff then issued a notice of sale in accordance with law, which notice described the property as it was described on the tax rolls. This notice was posted in three public places, one at the courthouse, one at the post office, and one at the town hall, and a notice of distraint was posted along with this notice, and the two kinds of notice were posted at Hamilton creek, where some of the respondent's personal property was located. The sheriff testified that a copy of both these notices was mailed to Mr. Franks. The notice of sale provided that, at 10 o'clock on the forenoon of April 28, 1917, the sheriff would sell, at the courthouse

of Skamania county, personal property of the Hamilton Creek Timber Company for delinquent personal property taxes. It was between the time of the posting of these notices and the sale that the taxes of 1915 were paid, as we have already noticed. The property was offered for sale in conformity with the notice, and was purchased for the delinquent taxes for the year 1916 by the appellant, he being the sole bidder.

The validity of this sale is attacked on several grounds: First, that the assessment was void for the reason that the property was not, at the time of the assessment, owned by the Hamilton Creek Timber Company, but was owned by the respondent. The answer to this is that the respondent had paid real and personal property taxes for the year 1915 and real property taxes for the year 1916 on its property so assessed, and had received notice of the delinquency of the personal property taxes for 1916, and therefore knew that it was assessed in the name of the Hamilton Creek Timber Company.

"If the property is intended to be assessed in the name of the right owner, the assessment will not be vitiated by mistake if he is not misled." 37 Cyc. 1005.

Second: It is objected that the assessment and sale were void because they embraced real property. The sheriff's sale did not describe, nor attempt to describe, any real property, and the assessor testified that he did not assess any real property, but that the railroad referred to in the assessment and sale was the railroad situated upon leased land, which was personal property, and this was what appellant bought at the sale, and is all that he claims to have received.

Third: The respondent claims that no lawful distraint of the property was made as provided in ch. 137, Laws of 1915, p. 370 (Rem. Code, § 9223a), its claim being that the sheriff, in order to distrain, must

seize the property and take it into his actual, physical possession. In view of the fact that the property consisted of a railroad some miles in length, locomotives situated in different places, cars, cable and equipment at different places, we do not think the sheriff would necessarily have to do more than was done in this case in order to distrain. The argument advanced by the respondent, that the sheriff, in order to distrain, must take the personal property into his actual, physical possession, is stated as follows:

"When tangible property is actually seized, the owner has notice of it, for he is bound in law to keep in touch with his property; and he is therefore advised of the distraint when actual seizure is made. In no other way is he advised of such distraint under this statute with respect to tangible property; for, so far as that kind of property is concerned, the law provides no kind of notice of the distraint, but only a notice of the sale so as to insure the property bringing a fair price."

The answer to this is that, in the first place, it was physically impossible to take actual, physical possession of the personal property assessed, and if the purpose of such taking is merely to give the owner notice, in this case it had actual notice, which should have been a great deal more effective than the notice which would have been imputed to it from the mere fact that the sheriff had gone up into the woods and taken possession of its property. The respondent also argues that, if the property was of such a character or so situated that an actual, manual seizure of it could not be made, there could not be any distraint. We cannot subscribe to this argument, for the reason that it is a conclusion which leads to the absurd result that taxes could not be collected on personal property which is so situated or of such character that the

sheriff cannot take it into his actual, physical possession. The statute does not provide that he must take the personal property into his physical possession, and this operates for the benefit of the owner, for the presumption must be that the owner will pay his taxes, and it certainly would work a great hardship in many cases if the sheriff, in order to make a distraint, should have to take actual, physical possession of the property distrained. For instance, in this case, if that had been necessary, the sheriff would have been compelled to tear up miles of track, disorganize the entire plant of respondent and work a great injury to respondent in its business. By posting notices of distraint and giving the company notice thereof, the sheriff did everything that was necessary under the statute, and certainly everything that was reasonable. If he had done more and taken into his actual, physical possession the personal property, the respondent would have a just ground for complaint.

Fourth: It is claimed that the sale was void for the reason that the sheriff, deriving his authority solely from the statute which gives him the authority to sell the personal property of the person against whom the assessment is made, in this case sold the property of respondent for an assessment made against the Hamilton Creek Timber Company. We have already answered this point by showing that the business of the respondent had been carried on, to a certain extent, under the name of the Hamilton Creek Timber Company, and thus the assessment and sale in the name of the Hamilton Creek Timber Company did not operate to the disadvantage of respondent.

Fifth: It is claimed that the sale was void by reason of the fact that the property sold was grossly in excess of the amount of the tax. This is really the

chief reason that respondent advances for setting aside this sale. This court, like nearly every court to whom the question has been presented, has held that, at a tax sale, the inadequacy of the price received is no ground for invalidating the sale. *Rothchild Brothers v. Rollinger,* 32 Wash. 307, 73 Pac. 367. The purpose of the tax sale is to collect taxes, and of necessity all such sales must result more or less in the buyer receiving property that is potentially of considerably more value than the amount of the taxes for which it is sold. These sales are held for the purpose of securing the collection of public revenue and are not to be as closely inquired into as to the adequacy of the consideration as are foreclosure and execution sales and sales of that character. It is a summary method taken to insure the collection of the public revenue.

Sixth: It is claimed that the sale was void for the reason that the property was not offered in parcels but was sold in a lump, and that it was not possible for it to be seen by those desiring to purchase. The record discloses that the sheriff, at the time of sale, announced that he was ready to sell in parcels, but that no bidder appeared desirous of buying in that manner, and that the property was then offered in a lump and was bid in by appellant, who was the only bidder present. As to whether the sale should have been had in the presence of the property, we are satisfied that there is no requirement that the sale be conducted in that manner, and in this case it would have been impossible to have so conducted it. There was no one place where all of the personal property was located or could have been collected, and if there had been any such place, it would have been so situated that the likelihood of any bidder being present would have been very remote. It was more likely that an adequate bid

would have been received at the county seat than at any place along the railroad or in the woods owned by respondent. Under the circumstances, the sheriff did the best possible thing to secure a buyer and to collect the taxes due.

The law was complied with in the matter of the assessment and sale, and everything that it provided for was done. All the notices required and some additional ones were given, and the respondent, through different sources, was in possession of actual knowledge that its property was subject to sale and was in a fair way of being sold. The reason that the taxes were not paid was that respondent was negligent, and that negligence continued while respondent sat by and allowed the sale to take place, of which it had been advised. The proceedings were as regular as are contemplated by the statute, and the fact that respondent may have, by its own carelessness, lost possession of its personal property is no reason for this court's attempting to read into the law requirements which would restore the property to respondent in this case, but which would make the collection of personal property taxes in hundreds of other cases a matter of such difficulty as would interfere with the securing of public revenue and add to the requirements which the legislature has deemed sufficient to protect the property owner who has failed to pay his taxes in time.

The judgment will be reversed and the action dismissed.

MAIN, C. J., HOLCOMB, PARKER, MITCHELL, FULLERTON, CHADWICK, and TOLMAN, JJ., concur.

[No. 14761. Department Two. December 9, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES A. PALMER, *Appellant*.[1]

HOMICIDE (5, 6)—MANSLAUGHTER—ELEMENTS—KILLING WITH DESIGN—STATUTES. Under Rem. Code, §§ 2392-2395, defining murder in the first degree as the killing with premeditated design to effect the death of the person killed, murder in the second degree as the killing with such design but without premeditation, and manslaughter as every other killing not excusable or justifiable, killing with a design to effect death is murder and the element of manslaughter is excluded, even if under provocation or sudden heat of passion.

SAME (118) — TRIAL — INSTRUCTIONS — GRADE OR DEGREE — MANSLAUGHTER. Under a plea of self-defense, admitting that the killing was with a design to kill, the accused is guilty of murder or not guilty and is not entitled to an instruction on the subject of manslaughter, as defined by Rem. Code, § 2395.

SAME (94, 121)—TRIAL—ABSENCE OF EVIDENCE OF MANSLAUGHTER. On a plea of self-defense, accused is not entitled to an instruction on the subject of manslaughter, where there was no evidence to show facts within the statutory definition of manslaughter.

CRIMINAL LAW (316) — TRIAL — INSTRUCTIONS ALREADY GIVEN. Error cannot be assigned upon the refusal of requested instructions where the instructions given fairly covered the subject.

SAME (255)—TRIAL—INSTRUCTIONS—COMMENT ON EVIDENCE. In a prosecution for murder, a request to instruct the jury to consider the intoxicated condition of the deceased at the time he was shot, as bearing upon the weight to be given to his dying declaration made three days later, is properly refused as a comment on the evidence.

HOMICIDE (46)—EVIDENCE—ADMISSIBILITY—OTHER OFFENSE. In a prosecution for murder, in which the testimony necessarily showed that two persons had been shot and had subsequently died and the jury was thoroughly familiar with the fact, it is not error to refuse to strike the testimony of the killing of the second victim.

SAME (48). In a prosecution for murder, in which it appears that two persons were shot by the accused, evidence as to the wounds on the body of the second victim, for whose killing accused had been acquitted, may have been competent as to the direction of the shots fired by accused.

[1]Reported in 176 Pac. 547.

CRIMINAL LAW (448)—APPEAL—HARMLESS ERROR—RECEPTION OF EVIDENCE. Error of a harmless nature in the reception of evidence in a murder case does not justify a reversal.

HOMICIDE (67)—EVIDENCE—ADMISSIBILITY — DYING DECLARATIONS —ATTENDING CIRCUMSTANCES. Oral testimony of the circumstances under which a dying declaration, taken down and subscribed in due form when made, is admissible as explanatory.

SAME (62)—EVIDENCE—ADMISSIBILITY — PREVIOUS THREATS—REMOTENESS. Upon an issue of self-defense, evidence of threats against the accused made ten years before, and testified to by a witness who had not lived in the neighborhood for seven years, are too ancient to be admissible.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered October 23, 1917, upon a trial and conviction of murder in the second degree. Affirmed.

Del Cary Smith, C. T. McDonald, and *Geo. F. Cowan, Jr.*, for appellant.

John B. White and *Joseph B. Lindsley,* for respondent.

MACKINTOSH, J.—The jury, trying the appellant on an information charging him with the commission of the crime of murder in the first degree, returned a verdict of murder in the second degree, after having presented for its consideration testimony on behalf of the appellant in support of his plea of self-defense.

On March 26, 1917, at the town of Milan, in Spokane county, the appellant shot and killed Nels Verback. Several persons, among whom was the deceased, had congregated at a pool hall, where they had been drinking diluted alcohol, and one of them, the fifteen-year old son of the deceased, had become hopelessly intoxicated, and was lying on the floor behind a billiard table. At about seven o'clock in the evening, the appellant entered the pool hall, of which he was the rental agent, and after viewing the situation there,

came out and made some remarks about the condition of the boy, and started to leave, when he was seized by one of the party. He demanded that he be released, which was done. The appellant then turned around and fired three shots, resulting in the death of Nels Verback and one of his sons.

The appellant's evidence tended to establish, that, after having entered the pool hall and making some remark that it was wrong to give liquor to a boy, he started to come out, when one of the party entered into a more or less acrimonious discussion with him, and struck at him; that another man grabbed the appellant from behind and pinioned his arms to his sides; that thereupon several other persons grabbed the appellant; that the deceased reached around a post, took the appellant by the neck, and commenced to choke him; that several of the party had hold of him by this time, and all of them were apparently trying to get their hands on him, and that he was struck four or five blows on the head; that, while being choked and struck, the appellant managed to get his hand to his hip pocket, and pulled out a revolver and fired.

The appellant had resided in the town of Milan for more than ten years prior to the time of the killing, and had been justice of the peace and a special deputy sheriff. He believed that certain persons in the town had a grudge against him and had threatened to do him bodily harm. While justice of the peace, some ten years before the shooting, he had formed the habit of carrying a loaded revolver and he was so armed at the time he entered the pool hall.

All of the state's witnesses denied that there was any attempt to approach or lay hands on the appellant, except by one of the party, who at one time caught hold of the appellant, but immediately released him, and thereupon the appellant stepped back and

shot the two men. As already noted, the appellant sought to justify the homicide on the ground that it was committed in self-defense.

I. The principal reason urged for the granting of a new trial is that the court did not submit to the jury instructions upon the crime of manslaughter, but withdrew that degree of homicide from the issues in the case. This raises for our consideration the definition of manslaughter as that crime now exists in this state.

The appellant concedes that, unless the facts warrant an instruction upon manslaughter, it would have been error to have given such an instruction, and that the crime of manslaughter is not necessarily included within the charge of murder. This has been held so often by this court that it is not necessary to recite the long list of cases to that effect.

Volumes have been written upon the distinctions between murder in the first degree, murder in the second degree, and manslaughter; and it is probably true that no branch of the criminal law has been more exhaustively treated in both decisions and text books. But these are all of little assistance to us, in view of the peculiar statute in this state. So far as our research has carried us, we have been unable to find that any state in the Union has attempted to define the degrees of murder and manslaughter exactly as our statute defines them. It is true that the framers of our criminal code of 1909 lifted from the code of New York the sections defining murder in the first and second degrees and manslaughter. But, like many purloiners of other people's property, they did not succeed in taking with them all the accessories to the parts which they appropriated.

The New York code, after defining manslaughter as it is defined in § 2395 of Remington's Code, to wit: "In any case other than those specified in sections

2392, 2393, and 2394 [being murder in the first degree, murder in the second degree, and killing in duel], homicide, not being excusable or justifiable, is manslaughter," proceeds and enumerates the degrees of manslaughter, and provides, among other things, that homicide, when committed without design to effect death, in the heat of passion, shall constitute manslaughter. These sections are omitted from our code.

At common law and under our statute, up to the time of the passing of the new criminal code in 1909, as far as the matter before us is concerned, murder in the first degree was the killing purposely and of deliberate and premeditated malice. Murder in the second degree was the killing purposely and maliciously, but without deliberation and premeditation. And manslaughter was the unlawful killing "without malice, express or implied, either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act."

The code of 1909 defined murder in the first degree as the killing with premeditated design to effect the death of the person killed. Murder in the second degree is defined as the killing committed with the design to effect the death of the person killed, but without premeditation. And manslaughter was every other killing not being excusable or justifiable.

It would seem from this that the voluntary killing upon sudden heat, which was formerly included in the crime of manslaughter, has been taken out of that classification by the act, and, as the law now stands, every killing which is accompanied by a design to kill is either murder in the first degree or murder in the second degree, depending upon whether that design was or was not accompanied by premeditation. No longer is the intentional killing upon sudden heat, or the intentional killing, no matter how provoked,

classified as manslaughter. And as soon as it appears that the killing was with a design to effect death, the element of manslaughter disappears from the case. That grade of homicide is characterized by the fact that the one guilty of it possessed no design to kill. If the purpose to kill is present, the offense must be murder in one of its degrees.

People v. Beckwith, 103 N. Y. 360, 8 N. E. 662. Manslaughter, as it now stands on our statutes, comprises those undesigned killings committed in the commission of some unlawful act which are not excusable or justifiable.

In this condition of the law, two reasons are shown by the record in this case why the appellant was not entitled to an instruction upon the crime of manslaughter. The first of these is that, by his plea of self-defense and his statement of his purpose, he admitted that the killing was with a design to kill; but he attempted to justify it upon the ground that he reasonably apprehended great personal injury to himself, and that there was imminent danger of such injury being perpetrated; or that he killed in the actual resistance of an attempt to commit a felony upon him. By this plea, having admitted that he shot with the design to effect the death of the deceased, he was, on his own theory, either guilty of murder in the second degree or not guilty. The other reason why the instruction was properly refused is this: Admitting that the defendant might be entitled to an instruction as to manslaughter where he had entered a plea of self-defense, upon the production of testimony which might show facts within the definition of manslaughter, a careful reading of the statement of facts reveals no such testimony. There is evidence which shows that the homicidal act was done under the influence of passion produced by provocation; and at

common law this would have constituted manslaughter, Chief Justice Shaw saying in *Commonwealth v. Webster,* 5 Cush. (59 Mass.) 295, 52 Am. Dec. 711:

"Manslaughter is the unlawful killing of another without malice; and may be voluntary, as when the act is committed with a real design and purpose to kill, but through the violence of sudden passion, occasioned by some great provocation, which in tenderness for the frailty of human nature, the law considers sufficient to palliate the criminality of the offence."

The makers of our criminal code having steeled themselves against the feeling of tenderness for the frailty of human nature, no longer palliate the offense, and all killings not excusable or justifiable, done with a design to effect death, constitute murder in one of its degrees. Whether this was a wise and salutary step away from the long established and well understood classification at common law is not for us to inquire. It is an expression of the legislative will upon this subject, and the remedy for the defect, if it be a defect, exists with the legislature and not with the court.

II. Refusal of requested instruction as to prior threats and ill-feeling against the appellant.

III. Refusal of requested instruction as to the drunken condition of the persons whom the appellant claimed assaulted him at the time of the shooting.

The substance of the instructions requested as to prior threats and ill-feeling was contained in instruction number ten as given by the court. And that instruction also fairly covers the matters requested in the instruction in regard to the intoxicated condition of the persons present at the time of the shooting.

IV. Refusal of requested instruction as to dying declaration, and the giving of one by the court on the same subject. The instruction as to the weight to be

given a dying declaration followed the rule established in *State v. Eddon,* 8 Wash. 292, 36 Pac. 139, and while not as elaborate a statement as the one requested by the appellant, correctly and fully covered the subject.

V. Refusal of requested instruction as to the taking into account of the intoxicated condition of the deceased at the time of the shooting, as bearing upon the weight to be given to his dying declaration made some three days thereafter.

The evidence discloses that the deceased, for some time prior to the shooting, had been drinking diluted alcohol, and was in a more or less intoxicated condition at the time the altercation occurred. The appellant insists that he was entitled to have the jury instructed that, in weighing the dying declaration of a person made under such circumstances, they should take into consideration the intoxication of the deceased at the time he was shot by the appellant's bullet, as affecting the likelihood of his later reliably knowing or recollecting what occurred at that time. As we view it, this requested instruction partook largely of a comment upon the evidence in the case, and on that ground was properly rejected. As we have recently held in *State v. Smith,* 103 Wash. 267, 174 Pac. 9, cautionary instructions to juries, singling out certain classes of witnesses or classes of testimony, and warning them to view with suspicion or extreme care such testimony, are not to be encouraged. It is proper matter for argument to the jury to call upon their common experience, and warn them against the too easy reception of testimony from certain sources, or given under certain conditions. But under our law, which prohibits the instruction of the jury by the court upon questions of fact, it is hardly proper for the court to indulge in the practice of pointing out weaknesses in the testimony.

VI. Refusal to strike testimony relating to the killing of the second victim of the appellant's shots.

The testimony in the case necessarily showed that two persons had been shot and had subsequently died. This testimony had, of course, appeared in numerous ways, and necessarily appeared in numerous ways during the trial, and the jury was thoroughly familiar with that fact.

The appellant complains that the testimony of the coroner as to the wounds on the body of the second victim, for whose killing the appellant had already been acquitted, should have been excluded. This testimony might have been admissible as to the direction of the shots fired by the appellant, had that been a material inquiry in the case. From the record we are unable to satisfactorily determine whether that was a material matter or not. But in any event, the reception of this evidence, if error, was of a harmless nature and does not justify a reversal of the case.

VII. The admission of oral testimony relating to the dying declaration.

This dying declaration was prepared by a witness present at the bedside, who wrote down the statement as it was made; he then read it over to the declarant, who there and then subscribed and swore to it. This statement was taken in the form of an affidavit in narrative form, although it had been elicited by questions. This was a proper form in which to submit the dying declaration to the jury. 1 R. C. L. 543. The oral evidence objected to referred to the circumstances under which the declaration was made, and gave the setting, and was properly admitted as explanatory of the circumstances and surroundings.

VIII. Exclusion of testimony as to threats against the appellant made by certain parties involved in the altercation out of which the killing arose.

These threats, which were excluded, referred to incidents occurring ten years before the shooting, and proof of them was offered through a witness who had not resided in the vicinity for seven years. It takes no argument to demonstrate that these threats were too ancient to be admissible.

Being satisfied that, under both the law and the facts, the appellant has had a proper trial, the judgment is affirmed.

MAIN, C. J., HOLCOMB, and MOUNT, JJ., concur.

[No. 14781. Department Two. December 9, 1918.]

THE STATE OF WASHINGTON, *on the Relation of Tacoma Eastern Railroad Company, Appellant,* v. NORTHERN PACIFIC RAILWAY COMPANY *et al., Respondents.*[1]

RAILROADS (29)—CONSTRUCTION — CROSSINGS — APPORTIONMENT OF COSTS. In apportioning the costs of interlocking devices to be maintained at a grade crossing, the public service commission should not be governed by the priority of the pioneer road, nor by the character of the service or construction by the crossing road; but is to exercise its discretion on the resulting convenience and inconvenience.

SAME (29). In the absence of abuse or arbitrary action, the courts will not review the discretion of the public service commission in apportioning the cost of interlocking devices; and no abuse appears in apportioning two-thirds of the cost to the petitioner seeking to cross a main line road by its branch line, to serve Camp Lewis on request of the government; considering the greater number of trains run on the main line, and the fact that the branch line was for the benefit of territory devoted to a particular use.

Appeal from an order of the superior court for Pierce county, Chapman, J., entered January 19, 1918, affirming an order of the public service commission, after a hearing before the court. Affirmed.

[1]Reported in 176 Pac. 539.

F. M. Dudley, for petitioner, upon the question of the proper apportionment of the cost of the interlocking device, cited: *Grand Trunk Western R. Co. v. Railroad Commission of Indiana,* 40 Ind. App. 168, 81 N. E. 524; *Wabash R. Co. v. Commissioner of Railroads,* 120 Mich. 697, 79 N. W. 910; *Detroit, Ft. W. & B. I. R. Co. v. Commissioner of Railroads,* 127 Mich. 219, 86 N. W. 842, 62 L. R. A. 149; (Affirmed in 189 U. S. 383); *Louisville & N. R. Co. v. New Orleans Terminal Co.,* 120 La. 978, 45 South. 962; *Lima & Toledo Traction Co. v. Toledo R. & Terminal Co.,* 30 Ohio Cir. Ct. Rep. 355; *Toledo R. & Terminal Co. v. Lima & Toledo Traction Co.,* 79 Ohio St. 136, 86 N. E. 515; *Cincinnati Northern Traction Co. v. Pittsburgh C. C. & St. L. R. Co.,* 79 Ohio St. 243, 86 N. E. 987; *Railroad & Warehouse Commission v. Litchfield & M. R. Co.,* 267 Ill. 337, 108 N. E. 347; *State Public Utilities Commission v. Illinois Cent. R. Co.,* 274 Ill. 36, 113 N. E. 162; *State ex rel. Puget Sound & Willapa Harbor R. Co. v. Northern Pac. R. Co.,* 94 Wash. 10, 161 Pac. 850.

Geo. T. Reid, J. W. Quick, and *L. B. da Ponte,* for respondent Northern Pacific Railway Company.

CHADWICK, J.—This proceeding is brought to review an order of the public service commission fixing the duties and obligations of the petitioner and the respondent with reference to the installation and maintenance of an interlocking device at a grade crossing near the town of Roy. Petitioner is a subsidiary of the Chicago, Milwaukee & St. Paul Railway Company, which, like the respondent, is a transcontinental railway.

The respondent is the senior company and has, for more than forty years, maintained and operated, as part of its main line, its tracks running between Taco-

ma, in this state, and Portland, in the state of Oregon. It serves the army cantonment at Camp Lewis by a branch line which leaves the main line at the station of Lakeview, a few miles north of Roy. By agreement, the Great Northern Railway operates its trains over the tracks of the respondent company and likewise serves the cantonment.

At some time subsequent to the establishment of the cantonment, the war department invited the petitioner to extend a branch line into the camp. To do this it was necessary to cross the main line of the respondent company. The matter coming on formally before the commission upon the petition of the petitioner to install a grade crossing, that body found, *inter alia,* that a necessity existed for the construction of the branch line into the army post "in order that large bodies of troops might be moved at one time;" that it was impracticable to cross the tracks of respondent's railway either above or below grade; that the track to be constructed would be used for the purpose of serving the army post; that petitioner would operate two trains each way daily, and that respondent would operate four passenger trains and two freight trains each way daily; that the installation of and maintenance of an interlocking device was necessary for the protection of the traveling public, the railroad companies and their employees.

"That the petitioner and respondent are unable to agree upon an apportionment of the cost of installation and maintenance of said interlocking plant.

"That the cost of the grade preparation, the cost of the frogs, and the preparation for and installation of the frogs should be borne entirely by the Tacoma Eastern Railway Company.

"That the cost of installation of a proper interlocking plant will approximate $12,000, and that the same should be so installed that the trains of the Northern

Pacific Railway Company shall have priority and right of way over said crossing over the trains of the Tacoma Eastern Railway Company. The Tacoma Eastern Railway Company to operate the interlocking plant in such manner as to warn the approaching trains of the Northern Pacific Railway Company of the condition of the crossing when used by the trains of the Tacoma Eastern Railway Company; and that the cost of and installation of said interlocking plant should be borne, one-third thereof by the Northern Pacific Railway Company, and two-thirds thereof by the Tacoma Eastern Railway Company, and all maintenance thereof should be borne in like proportions by such companies."

Whereupon the commission made and entered the following order:

"We have investigated the statute relative to the apportionment of costs and also the opinion of our supreme court in the case of *State ex rel. Puget Sound & Willapa Harbor Railway Company v. Public Service Commission of Washington*, 94 Wash. 10 [161 Pac. 850]. There appears little, if anything, in either the law or the opinion of the supreme court to guide us in apportioning the cost. We have, however, based it upon such reasoning as would appeal to us in granting or withholding a certificate of necessity, had we jurisdiction over such matters. Under our statute, in apportioning costs we would be loath to burden the pioneer company with any considerable part of the expense of making a crossing or protection thereof, where the new company was only seeking to serve an industry already being served by the pioneer company. In cases, however, where the new road will serve a large district not served by the pioneer road or only partially served by the latter, then, in that event, there should be a substantial portion of the cost of the crossing and its protection borne by the pioneer company. In every event, before a crossing should be granted, a necessity should exist therefor. This necessity may be of high or low degree, depending upon the purpose

to be accomplished by the road seeking the crossing. In other words, the merit of the new road's purpose may be inquired into, and its magnitude. In the case at bar, the government has asked the Tacoma Eastern Railway Company, which is a subsidiary of the Chicago, Milwaukee & St. Paul Railway Company, to build to the army post. We cannot question the wisdom of the government in making this request. We must presume it is highly meritorious and that the Milwaukee system is warranted in seeking to comply with the wishes of the government. The army post, however, is now served by three other roads operating over roadbeds and rails of very costly construction, while the Tacoma Eastern Railway Company will build into the army post on a cheap roadbed and with light rails.

"Wherefore it is ordered; That the Tacoma Eastern Railroad Company be and is hereby permitted to construct and maintain its railway line at grade over and across the track of the Northern Pacific Railway Company at the location referred to in Finding III herein, and that said crossing be protected by what is known as the 'Cabin device of interlocking plant.'

"That the cost of the grade preparation, the cost of the frogs and the preparation for and the installation of the frogs shall be borne entirely by the Tacoma Eastern Railway Company. That the cost of said interlocking plant and the installation thereof shall be borne, one-third thereof by the Northern Pacific Railway Company, and two-thirds thereof by the Tacoma Eastern Railway Company, and that all maintenance thereof and of the frogs shall be borne in like proportions by said two companies. That said Tacoma Eastern Railway Company shall operate said interlocking plant in such manner as to warn the approaching trains of the Northern Pacific Railway Company of the condition of the crossing when used by the trains of the Tacoma Eastern Railway Company. That the trains of the Northern Pacific Railway Company shall have priority and right of way over the trains of the Tacoma Eastern Railway Company at such crossing."

Petitioner complains that the commission gave controlling weight to the following factors:

"(a) Priority of construction, they being clearly of the opinion that the existing road possessed an equity which should receive consideration in apportioning the costs growing out of the mere fact that it was the prior constructed road.

"(b) The nature of the public service which it was contemplated the junior road would perform.

"(c) The degree of public benefit involved in the construction of the junior road; and held in that connection that the commission would properly inquire into and consider the merit and magnitude of the new road's purpose.

"(d) The costliness of the new road.

"And no consideration or weight whatever to the purposes of the interlocker or its comparative benefit to the respective parties."

We grant the merit of much that is said by counsel, for the necessity being found, there can be no favor shown the company whose line is crossed merely because it is a pioneer company. Railroads are built to serve the public, and are granted privileges not accorded to private citizens or private enterprises. They are subject to public control, and the maxim "first in time is first in right" can have no binding application in determining their affairs, or in fixing their relative rights and liabilities. The suggestion that the cantonment is already adequately served is contrary to the conclusion of the commission that a crossing is necessary, and does violence to the underlying motive of this proceeding, which is the request of the war department. That a railway company is entitled to a monopoly of territory or traffic because of discovery or prior occupation is inconsistent with modern thought and opinion and the right of those who depend upon them as quasi public agencies. When a

petition is filed for permission to cross an existing road, there are three parties in interest, the two companies and the state; the latter having power to grant or refuse the petition. If it grants the right to cross, all questions of prior right or occupancy of the ground must give way, for the order is a finding by the sovereign state that the need of the public demands two roads instead of one, and the order *ipso facto* forecloses all questions of seniority or priority between the contending roads. This is the logic of *State ex rel. Puget Sound & Willapa Harbor R. Co. v. Northern Pac. R. Co.*, 94 Wash. 10, 161 Pac. 850, where we said

". . . a railway company first in time acquires no exclusive right to the territory through which it passes or exclusive right to operate its road in any particular manner. Both under the principles of the common law and by the express provisions of the constitution and statutes of this state, its line was subject to being crossed by the line of another railroad company,"

and we there held that it was within the power of the legislature to provide, contrary to the holdings of the court formerly pronounced, that the cost of a crossing and interlocking devices should be apportioned between the two companies.

Neither do we agree with the finding of the commission that the character of the service to be rendered by the crossing road is a thing, in and of itself, to be considered, or that the character of construction is in any sense a proper thing to be considered in apportioning the costs of construction and maintenance. But the legislature, acting within its admitted province, provided that the costs shall be apportioned. It no doubt had in mind the resulting convenience and inconvenience, for both must of necessity result to the

operating roads, as well as the difficulty of making an exact formula for the distribution of the costs. Considering the number of trains operated by either company; that the line of respondent is, in a sense, a main line operating between terminals of commercial importance; that petitioner selected the place of crossing to suit its best convenience, and that petitioner's line is a branch line and to be operated as it were into and for the benefit of property or territory devoted to a particular use, and the inability of the commission, as well as the courts, to fix to a mathematical certainty the portion of the costs to be borne by the parties, we feel compelled, as did the trial court, to fall back upon the discretion of the commission, and being unable to say that it has abused that discretion, direct that its order be affirmed.

It seems that this result must follow, unless the theory of counsel that, the crossing being ordered and installed, the maintenance of the interlocking device, because of the greater number of trains operated by respondent, will result in a greater benefit to it than to the petitioner. He contends, and it is no doubt true, that, if the commission had ordered a grade crossing without interlocking device, the cost of operation would have been much greater than it will be with that device installed. He reasons that, the cost of stopping each train being $1.57, the daily cost to respondent would be $9.42, or $3,438.30 for the year; that the interlocking device operates as a direct saving of this amount, while the petitioner, upon whom the burden of operation is placed, and against whom the device is set, must make a stop at either side of the crossing, one to release the interlocker, and, after passing, to set it again.

These arguments are engaging and, in the abstract,

are hard to meet, but there are considerations, such as time, which are of greater importance to a main line road than to one operating a branch line. So, too, the number of trains operated may well be a subject of constant change, and a present condition is not to be taken arbitrarily as determinative of the rights of the parties.

Wherefore, unless we can say that the order of the commission is wrong in the sense that its discretion has been arbitrarily exercised, we must, under well settled rules, say that it is not to be overcome by judicial decree. To do so would be but to substitute our own will for that of the commission, and in so doing we would in all probability trench upon some equities while declaring others. Being unable to say that we can render a better judgment than that rendered by the commission, and sustained on appeal by the lower court, we shall direct that the order be affirmed.

MAIN, C. J., MOUNT, MACKINTOSH, and HOLCOMB, JJ., concur.

[No. 14842. Department One. December 9, 1918.]

ANNA PATON *et al., Respondents,* v. CASHMERE WAREHOUSE & STORAGE COMPANY *et al., Appellants.*[1]

HIGHWAYS (53, 57)—USE FOR TRAVEL—NEGLIGENCE—MEETINGS—TURNING TO LEFT. Under Rem. Code, § 5562-26, requiring persons on meeting, to seasonably turn to the right of the center of the highway, it is negligence, which was the proximate cause of the accident, for the driver of a truck, already to the left of the center, to suddenly swerve to the left and strike the rear of an approaching auto that was at the extreme right of a level road fifty feet wide.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered January 3, 1918, upon findings in favor of the plaintiffs, in an action for damages to an automobile sustained in a collision, tried to the court. Affirmed.

Sam R. Sumner, for appellants.

Charles F. Wallace, for respondents.

MITCHELL, J.—This is an action to recover damages to an automobile by reason of a collision with a motor truck owned by appellant Cashmere Warehouse & Storage Company, a corporation, which was driven at the time by appellant J. H. Sprague in the delivery of ice for the corporation in the town of Cashmere and vicinity. The collision occurred about 1:30 o'clock in the afternoon, at a point on a public highway running east and west along the south boundary of the town. The automobile was running towards the west, the truck towards the east. At the place of the collision, and for some distance east and west, the highway is open and smooth, and the traveled portion of it is about fifty feet wide. On the south side and ad-

[1]Reported in 176 Pac. 544.

joining the road at the place of the accident, in front of the residence of one F. W. Stein, the ground is level with the road. Going westward in the town, this highway runs southwesterly at an acute angle to, and rounds an easy curve into, this east-and-west stretch of the road at a point about 100 feet east of the place at which the collision occurred. Sprague, engaged in the delivery of ice, was returning from west of the Stein home, and some distance before reaching it blew a signal understood by, and intended to attract the attention of, the Steins, who were customers, and thereafter proceeded in the center of the road at a speed of about six miles an hour, steadily looking southward towards the Stein house to ascertain if ice was wanted, until just about opposite the Stein home, when he was advised, by signal, ice was not wanted. In the meantime, and for some little distance, the course of the truck had veered, and continued to veer, slightly to the left, so that it was already north of the center of the road when Sprague, upon changing his view from the Stein house, first saw the approaching automobile, within fifteen or twenty feet, traveling in such direction as to be entirely safe but for the fact that instantly Sprague caused his truck to turn abruptly to his left, smashing into the rear end of, and upsetting, the automobile and causing the damage complained of. From the other way, the automobile was driven about fifteen miles an hour by one Eliot, who, with a companion, in rounding the curve in the road, and while at a distance of about one hundred and sixty feet from the approaching truck, observed that Sprague was looking in another direction than straight ahead, and also noticed the situation and direction of the truck. Eliot, who was already on the north or right-hand side of the road, promptly put his automobile to the extreme north side of the road, running

for some distance within six to twelve inches of a ditch or gully of consequence without apparent danger from the approaching truck but for the sudden turn or swerve of the truck when so close by that the accident could not be avoided by Eliot. Neither driver gave any signal or warning. There was a trial to the court without a jury, and findings and judgment for plaintiffs.

The law of the road in this state is as stated in § 26, ch. 142, Laws of 1915, p. 394 (Rem. Code, § 5562-26), as follows:

"It shall be the rule of the road that every person driving a motor or other vehicle or riding or driving any animal or animals upon the public highway or in any other similar use of such highway shall, upon meeting any other person so using such highway, seasonably turn to the right of the center of the highway so as to pass without interference. . . ."

Obeying this rule, respondent's automobile was being driven on the right-hand or north side of the road, and on observing the approaching motor truck, somewhat over the center and on the same side of the road, the driver of the automobile seasonably took to the north limit of the highway, pursuing a course which was perfectly safe, until the driver of the motor truck suddenly and violently further deflected its course to the left, leaving no chance or opportunity for the driver of the automobile to escape collision.

On the other hand, the truck driver, while, of course, having the right to attempt to get the attention of, and to glance away from the road to get a signal from, a prospective ice customer, steadily gazed in that direction for a considerable time as his truck, already in the middle of the road, commenced to swerve to the wrong side, when there was approaching, as he could and should have seen, one driving an automo-

bile; and yet he negligently refused or failed to see it until so near by that, by his negligent and sudden turn still more directly to his left, he collided with the auto, which he could and would have entirely escaped but for his last negligent act. Thus it is seen that the truck driver's negligence was progressive and continued up to the very time of collision, the last act of which was the immediate cause of the accident. While some other questions are discussed by counsel, we are of the opinion that the controlling one in this case is simply one of negligence and the ascertainment of whose negligence was the cause of the injury. This, of course, is a question of fact, which the trial court found against appellants. The evidence, which has been examined, satisfied us that the trial court was right, and that the negligence of the motor truck driver was the proximate and efficient cause of the collision.

There exists between the parties some question of practice, still unsettled, involving the condition of the record here, which we ignore after hearing the case argued on the merits; a course on our part harmless to the parties, because that one contesting the record gets a favorable decision at our hands, while the other has received the consideration of the whole record, which is short, as if it had not been questioned. Judgment affirmed.

MAIN, C. J., FULLERTON, PARKER, and TOLMAN, JJ., concur.

[No. 14954. Department Two. December 9, 1918.]

A. J. WESTERVELT, *Respondent*, v. SAMUEL L. SCHWABACHER, *Appellant*.[1]

MUNICIPAL CORPORATIONS (391)—USE OF STREETS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The contributory negligence of a pedestrian, struck by a backing automobile at a street crossing, in failing to look in the direction after the auto had passed him, is for the jury, where he was giving his attention to and waiting for another automobile which was passing between him and the defendant's automobile, and the time was short and circumstances such that plaintiff might be justified in assuming that it was not going to be backed over the line of the sidewalk.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered April 12, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by an automobile. Affirmed.

Kerr & McCord and *Stephen V. Carey*, for appellant.

Roberts & Skeel, for respondent.

PARKER, J.—The plaintiff, Westervelt, seeks recovery of damages for personal injuries which he claims to have suffered as the result of the action of the defendant, Schwabacher, in negligently backing his automobile and running over the appellant, at the intersection of Fourth avenue and Spring street, in Seattle. Trial in the superior court for King county, sitting with a jury, resulted in verdict and judgment in favor of the plaintiff, from which the defendant has appealed to this court, contending that the plaintiff should be denied recovery because of his contributory negligence, and that the case should have been so disposed of as a matter of law.

[1]Reported in 176 Pac. 545.

There seems but little room for controversy as to what occurred at the time and place where respondent was injured. For present purposes, we may assume that Fourth avenue runs north and south, and that Spring street runs east and west. They intersect at right angles in the business district of the city. At about 9:15 o'clock on the evening of June 28, 1917, respondent was walking north along the east sidewalk of Fourth avenue. When he had reached a point a few feet south of Spring street, appellant passed him, going north, driving a large seven-passenger automobile along the easterly side of the roadway on Fourth avenue. Respondent noticed appellant's automobile as it passed onto the intersection of Fourth avenue and Spring street and turned to the west as if to proceed west on Spring street. In turning, appellant kept to the east side of Fourth avenue and the north side of Spring street, apparently in obedience to the well known rule requiring drivers of automobiles to so turn their machines when turning to the left from one street onto a cross-street. Respondent, intending to proceed north along the east sidewalk of Fourth avenue across Spring street, gave no more thought or attention to the appellant's automobile, assuming that, in so far as his safety was concerned, there was no necessity for him so doing. When last noticed by respondent, appellant's automobile was near the center of Fourth avenue and moving west. Not seeing any other vehicle, either on Fourth avenue or to the west on Spring street coming in his direction, respondent proceeded across Spring street along the line of the east sidewalk of Fourth avenue, and seeing an automobile coming along Spring street from the east, stopped momentarily at some point between the curb of the sidewalk and the center of Spring street to let it pass. When it had passed him he immediately

proceeded on his way, and had taken but one or two steps when he was struck, knocked down, and run over by appellant's automobile, which appellant was backing in an easterly, or possibly southeasterly, direction across the line of the east sidewalk of Fourth avenue on the intersection of the streets. The automobile which passed west along Spring street passed between respondent and appellant's automobile just before he was struck by appellant's automobile. This may account in some measure for respondent's not seeing appellant's automobile, while it was backing, in time to avoid being injured. Respondent, we assume, did not look to the west in the direction of appellant's automobile after seeing it near the center of Fourth avenue moving west, but gave his attention wholly to the other automobile, assuming that it was unnecessary to pay any further attention to the possible approach of automobiles from the west, either upon Fourth avenue or along Spring street. From the time that respondent last saw appellant's automobile until he was actually struck and knocked down was a very short time.

It is contended in appellant's behalf that respondent was guilty of contributory negligence, and that it should be so decided as a matter of law, because of his failure to look to the west, or in the direction of appellant's automobile, just prior to being struck and run over. We cannot agree with this contention. We have seen that respondent did look and see appellant's automobile in such a situation that he might be justified in assuming that it was not going to be backed over the line of the sidewalk on which he was proceeding, a very short time before he was hurt, and that his attention was then directed to the other automobile coming from the east along Spring street. It seems quite

plain to us that this furnished a situation which called for the submission of the question of his contributory negligence to the jury. It is true that, had respondent waited, after the passing of the other automobile, and again looked to the west, he might have seen appellant's backing automobile in time to avoid being injured; but, under all the surrounding circumstances, the jury could well believe that his knowledge, acquired from his looking so short a time previously, warranted him in proceeding without looking again in that direction. The following, among other of our decisions, lend support to this conclusion: *Richmond v. Tacoma R. & Power Co.*, 67 Wash. 444, 122 Pac. 351; *Franey v. Seattle Taxicab Co.*, 80 Wash. 396, 141 Pac. 890; *Mickelson v. Fischer*, 81 Wash. 423, 142 Pac. 1160; *Redick v. Peterson*, 99 Wash. 368, 169 Pac. 804.

It is further contended that the award of the judgment was excessive in amount. A careful reading of the evidence convinces us that we would be wholly unwarranted in so deciding. We think this contention needs no further discussion.

The judgment is affirmed.

MAIN, C. J., FULLERTON, MOUNT, and HOLCOMB, JJ., concur.

[No. 14977. Department Two. December 9, 1918.]

S. J. RANDALL, *Respondent*, v. JOHN GERRICK *et al.*, *Appellants*.[1]

MASTER AND SERVANT (145, 155) — INJURY TO SERVANT — NEGLIGENCE—SAFE TOOLS—SUFFICIENCY OF EVIDENCE. Where a steel "snap" for heading rivets, with a soft end, was taken to the blacksmith by the foreman, and there was evidence that it was tempered on its return, and broke and injured the plaintiff on the first blow of the hammer, there was sufficient evidence to go to the jury on the question of whether the soft end had been tempered by the blacksmith.

SAME (90, 99)—ASSUMPTION OF RISKS—SIMPLE TOOLS—NOTICE. While a steel "snap" for heading rivets with a soft end for striking is a simple tool, when the foreman took it to the blacksmith to change the cup end, and had it hardened at the hammer end and made dangerous, it was his duty to notify the riveting crew; and plaintiff, injured when it broke at the first blow of the hammer, did not assume the risk, and was not required to make a careful examination to see if it was safe; there being evidence that the defect was not apparent from casual observation.

APPEAL (473)—REVIEW—SUBSEQUENT APPEALS—LAW OF CASE. A decision on a former appeal that one J. was not a partner of a firm is the law of the case and conclusive upon a second appeal.

Appeal from an order of the superior court for King county, Ronald, J., entered April 1, 1918, denying a new trial, in an action for personal injuries sustained by a riveter in bridge construction. Affirmed.

Kerr & McCord, for appellants.

John F. Miller, Heber McHugh, and *John T. Casey*, for respondent.

MOUNT, J.—The plaintiff brought this action against the defendants, and after issue joined and upon a trial to a jury, a verdict for twenty-five hundred dollars was rendered in favor of the plaintiff. On motion of the defendants, a judgment *non obstante* was entered

[1]Reported in 176 Pac. 675.

in their favor. The plaintiff appealed from that judgment to this court. On that appeal, the judgment was reversed, and the cause remanded with instructions to the trial court to enter a judgment upon the verdict. The decision of this court will be found in 93 Wash. 522, 161 Pac. 357, L. R. A. 1918D 179. Thereafter the trial court entered a judgment upon the verdict, and in due course the defendants filed a motion for a new trial, which was denied by the trial court. This appeal by the defendants followed.

It appears that, on October 25, 1910, the respondent, while working for Gerrick Brothers, as a riveter, on a steel bridge in the course of construction, was injured in his right eye by a chip or sliver of steel which flew from the end of a riveter, which is called in the record "a snap." This snap is a piece of steel with a cup in one end. The other end is of soft steel, the cup end being tempered. This snap is used for the purpose of making heads upon rivets. The cup end of the snap is placed over the heated rivet and is held in place by one man, while another man, with a sledge hammer, strikes the snap and thus forms a head on the rivet.

The respondent was an experienced structural iron worker and riveter and, at the time of the accident, was holding the snap. Several rivets had been headed by the riveting crew, when the foreman noticed that the heads of the rivets were cone shaped, and insisted that the heads of the rivets should be formed in what is called a "button" shape. He directed the riveting crew to have the snap changed from a cone shape to form a button shaped head. This snap was taken by the foreman to a blacksmith shop, and the cup therein was changed from a cone shape to a button shape. The soft end, or sledge hammer end, was also changed by having the burr, which had formed thereon by con-

stant use, which is common, trimmed off, so that there was no burr upon that end of the snap. When the snap was returned by the foreman to the riveting crew, they proceeded to again use the snap. The first blow of the sledge hammer upon the hammer end of the snap caused the snap to break and a piece from it to strike the respondent in the eye, thereby injuring him.

The contention of respondent at the trial was that the appellants were bound to furnish reasonably safe tools, and that they failed by furnishing a snap that was dangerous, in that it was tempered on the hammer end. The other facts necessary to an understanding of the case are stated in the opinion referred to in 93 Wash. 522, 161 Pac. 357, L. R. A. 1918D 179, *supra*.

It is now contended by appellants: First, that the tool used was a simple tool, and that the respondent assumed whatever liability there was of splinters flying from the head of the tool when it was struck by the sledge hammer. The respondent maintained, at the trial of the case, that the appellants negligently permitted the whole tool to be tempered, so that, when struck by the sledge hammer, it would chip and break, while the ordinary tool of that character should have a soft, untempered head upon the end struck by the sledge hammer, so that, when struck, it would spread rather than break; and that, by reason of the fact that it was permitted to be tempered by the blacksmith who changed the tool, without notice to the crew that was required to use it, this was negligence.

The appellants contend that there was no evidence sufficient to go to the jury that the tool, when it was returned by the foreman to the respondent, had been tempered; but from the evidence, as we read it, there was sufficient to go to the jury upon that question. While there was no direct and positive evidence that

the blacksmith who changed the tool actually tempered the hammer end of it, the evidence tends to show that it was tempered and that, upon the first blow of the hammer, it actually did break. There was also evidence on behalf of the respondent that a casual observation of a tool of that character would not disclose that it was tempered hard at the hammer end. This evidence was disputed by the appellants, and testimony was offered to the effect that a casual observation would disclose the fact that it had been tempered hard. We are satisfied, from reading the whole evidence, that this was a simple tool, but when the foreman upon the work took the tool to a blacksmith and had the tool tempered hard, without notice of that fact to the respondent, we think he was justified in relying upon the assumption that a safe tool was furnished to him. We think, from the whole evidence of the case, that the hammer end of this tool was tempered hard; that it broke by reason of that fact, and injured the respondent. We are also of the opinion that it was not the duty of the respondent to make a careful examination of the tool to determine whether it had been tempered hard or not. It was the duty of the foreman, knowing the fact, as he must have, that the tool had been tempered, to at least inform the respondent of that fact. This was not done, and there is no claim that it was done. There is some evidence in the record that the foreman himself had changed the tool, both at the tool end and at the hammer end. It was the duty of the foreman, under these circumstances to notify respondent of the fact that the hammer end had been tempered hard, because it is a conceded fact in the case that the hammer end of the snap is dangerous unless it is made of soft steel, untempered. The question of negligence was for the jury upon these facts.

The appellants further argue that the evidence shows that the appellant Jack was not a partner in the firm of Gerrick Brothers. This contention was urged on the other appeal, and upon that appeal we held that the evidence was sufficient to go to the jury upon that question. The decision upon the other appeal upon that question establishes the law of the case.

The judgment appealed from must therefore be affirmed.

MAIN, C. J., HOLCOMB, PARKER, and FULLERTON, JJ., concur.

[No. 14947. Department One. December 13, 1918.]

PIERCE COUNTY, *on the Relation of Thomas H. Bellingham et al., County Commissioners of Pierce County, Respondent,* v. J. J. DUFFY *et al., Appellants,* JOHN AUGUST ABRAHAMSON *et al., Respondents.*[1]

EVIDENCE (103-108)—HEARSAY—EXPERTS. The evidence of experts on land values is inadmissible and prejudicial where their estimates, as far as timber and improvements were concerned, were based on the estimates of other experts who were not called to testify.

TRIAL (39)—EVIDENCE—MOTION TO STRIKE. A motion to strike all the testimony of experts on land values, admittedly based in part on hearsay, is not too general because of the inclusion of proper preliminary testimony which was material only as associated with the valuations.

APPEAL (142)—PRESERVATION OF GROUNDS—EXCEPTIONS—INSTRUCTIONS. Error in orally instructing the jury is waived by the failure to take an exception to the giving of oral instructions at the time.

EMINENT DOMAIN (76)—MEASURE OF DAMAGES—BENEFITS FROM IMPROVEMENT. Upon condemnation for an army post, the measure of damages is the fair cash market value of the property without regard to any benefits that may result from the establishment of the post.

[1]Reported in 176 Pac. 670.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered March 20, 1918, upon the verdict of a jury awarding damages in condemnation proceedings. Reversed.

A. R. Titlow and *Clayton Chapman,* for appellants.

Fred G. Remann and *J. T. S. Lyle (Scott Z. Henderson* and *Robert M. Davis,* of counsel), for respondent.

MITCHELL, J.—Pierce county is condemning about 35,000 acres of land for an army post at Camp Lewis, as provided for in ch. 3, Laws of 1917, p. 2. An order adjudicating the public use and necessity was duly entered, and the cause set for trial to a jury to determine the compensation to be paid the landowners. For convenience the lands were divided into groups, twenty-five to fifty parcels of land belonging to different owners being considered in a group, and awards made by the jury accordingly. The trial as to one of these groups involved 200 acres belonging to appellants, J. J. Duffy and wife. At the commencement of the trial, the court, with the consent of all parties, adopted a rule on the question of ultimate values, limiting the number of expert witnesses on each side to three. There was a verdict and judgment, from which, as to their property, Duffy and wife appeal.

The first assignment of error is the denial of the trial court to strike certain testimony of the petitioner's witnesses. The three expert witnesses of the petitioner were Edmund Rice, S. R. Balkwill and J. C. Taylor, all of whom were shown to have personally examined the Duffy lands and to be well qualified to testify as to market values generally. These three witnesses testified with reference to the value of the different parcels in the group, and on reaching the Duffy tract, each of them testified that he was familiar

with it and knew its market value to be $5,306.15. Edmund Rice further testified as follows:

"Q. How much was the amount of the timber value on the Duffy place? A. $499.47. Q. Now you are testifying as far as timber and improvement values are concerned, not as an expert? A. I did not make the inventory of the timber or buildings. I took them as they were given by the experts who did make them."

Counsel for appellants then moved to strike the entire testimony of the witness on the ground that it was incompetent and hearsay. The motion was denied and an exception taken. After the witness Balkwill testified with reference to the market value of this land, he admitted under cross-examination: "The total value included the value of improvements made by other people. I accepted their figures as to the values of that property." After the witness Taylor testified as to the market value of this land, under cross-examination he said:

"Q. In your valuation you gave of $5,306.15 did you include any improvements? A. The amounts the builders gave us for the cost of the improvements and the amounts the timber cruisers gave us as to the value of the timber, were added to the valuations. Q. In other words, you have taken the estimates or word of someone else for the different values and added to your valuations and placed in your testimony here? A. Yes, sir."

After a few unimportant questions to the witness Balkwill, the county rested its case as to the Duffy tract, not having called any witness who had valued the improvements or timber whose estimates the three experts had referred to and relied upon. Whereupon, counsel for appellants interposed a motion as follows:

"On behalf of Mr. and Mrs. Duffy, the county having rested their case and not having supported the testimony of Mr. Balkwill, Mr. Rice and Mr. Taylor,

as to the timber and improvements, that being intermingled with the other and being purely hearsay, we move to strike out each and all of the testimony of these three witnesses, Balkwill, Rice and Taylor."

The motion was denied and an exception taken.

It is to be noticed that these witnesses, whose general qualifications are not questioned, do not say that they have learned from others the amount and value of the timber and the value of improvements and that they simply took the improvements and timber into consideration in a general way in fixing the value upon the whole of the property, but they say they relied upon values fixed by others upon improvements and timber, which values constituted a part of the total value fixed by each of the witnesses. Or, as one of them puts it: "The total value included the value of improvements made by other people. I accepted their figures as to the value of that property." It is true that the motion to strike covered all the testimony of the witness or witnesses and not simply their estimates of market value, but the testimony relating to their experience and general qualifications, while proper testimony, was only to show qualification to testify as to market value, which was the ultimate and only question for the jury. The inclusion of proper preliminary testimony does not destroy the efficacy of the motion if the testimony as to value alone should yield to such a motion directed simply to it, for the reason that the preliminary testimony would be immaterial and unavailing for any purpose except as it is associated with and supports the testimony as to market value. Nor can it be said that the motion, on account of its generality, included the testimony of the witnesses with reference to the lands of others in the group being considered by the jury, for it was made at the time of the taking of testimony concern-

ing the Duffy land, by the attorney for the Duffys, and finally specifically stated to be in their behalf and name.

The evidence moved against was highly prejudicial and should have been stricken. It did not derive its value solely from the credit to be given to the witnesses themselves, but rests also, in substantial part, on the veracity and qualifications of some other person or persons, not exposed to cross-examination in court nor speaking under the sanction of an oath. The denial of the motion to strike the evidence constitutes reversible error.

After the court instructed the jury in writing, at the request of the petitioner, an oral instruction was given as follows:

"I have instructed you that the burden of proof is upon the county to establish the fair market value of the property. There should be an exception to that. Where it is claimed that land has a particular value on account of some particular circumstances, the burden is upon the party asserting that particular circumstance to establish such fact as giving value to the land."

Appellants claim it was error to orally instruct the jury. Not having taken an exception to the giving of the instruction orally at the time it was given, appellants are to be considered as having waived the manner of giving it. *Taylor v. Kidd,* 72 Wash. 18, 129 Pac. 406.

Two other assignments of error may be considered together. They relate to two instructions concerning the measure of damages, as follows:

"Under the provisions of our constitution, and the provisions of our statutes, the measure of damage is the true, fair cash market value of the land taken, without regard to any benefits that may result from

the construction or establishment, or the proposed construction or establishment of an army post.

"You are instructed that you are to find the present fair cash market value of the property, as heretofore defined, and that in ascertaining such value, nothing is to be added thereto, by reason of any benefits accruing from the location, construction and maintenance of the army post. That is to say, you are to determine the present fair cash market value of the property, as if the mobilization, training and supply station, commonly called the Army Post, had not been located and constructed on the lands."

These instructions clearly state the law. They are supported by reason and authority. All of appellants' property is being taken for a purely public use, and there is no foundation for the fanciful theory that the taking of all of one's lands for a public use shall or can redound to the advantage of the owner by means of any supposed or contemplated increase in value flowing from the establishment and maintenance of such public improvement.

"If it is known from the very first exactly where the improvement will be located, if it is constructed at all, property that will be required for its site will not participate in the rise or fall in values, for since such property is bound to be taken if the improvement is constructed, it can never by any possibility either suffer from or enjoy the effects of the maintenance of the public work in its neighborhood; and consequently it is well settled that in such case in valuing the land the effect of the proposed improvement upon the neighborhood must be ignored." 1 Nichols, Eminent Domain (2d ed.), § 221; 10 R. C. L. 131, § 115, note 19.

The United States supreme court announced the same rule in the case of *Kerr v. South Park Commissioners*, 117 U. S. 379, as follows:

"In the nature of things the lands within the proposed park, and which were to constitute it, could not

have been thus specially benefited; and the owner of the lands in question should be allowed nothing on the ground that his property was thus specially benefited."

See, also, *San Diego Land & Town Co. v. Neale,* 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83; *Smith v. Commonwealth,* 210 Mass. 259, 96 N. E. 666, Ann. Cas. 1912C 1236; *St. Louis Elec. Terminal R. Co. v. MacAdaras,* 257 Mo. 448, 166 S. W. 307.

Further claims of error are predicated upon alleged misconduct of the trial judge in criticizing appellants' counsel, and again in the examination by the court of one of appellants' witnesses in such a way, it is contended, as to discredit the witness, both occurring during the trial, in the presence of the jury. It is apparent, however, that neither of such incidents will occur in another trial, and hence need not be further noticed here.

The judgment is reversed, and the cause remanded for a new trial.

MAIN, C. J., CHADWICK, TOLMAN, and MACKINTOSH, JJ., concur.

[No. 14963. Department Two. December 16, 1918.]

DU PONT DE NEMOURS POWDER COMPANY, *Respondent*, v. HANS PEDERSON *et al.*, *Appellants*.[1]

TROVER AND CONVERSION (29)—EVIDENCE—SUFFICIENCY—CONNECTION OF DEFENDANT. The evidence fails to show a conversion by the pledgee of a mortgage pledged to it as collateral security, where it appears that the pledgor prosecuted a suit of foreclosure thereon in the name and by consent of the pledgee, and had full control of the suit, and that the mortgaged property was lost by his fault alone, if by anyone's, when it sold for only sufficient to pay off prior mortgages.

APPEAL (428) — REVIEW — HARMLESS ERROR — ISSUES FOUND IN FAVOR OF APPELLANT. In an action of trover, where the jury found on competent evidence that there was no conversion, error in evidence as to the value of the property is immaterial.

Appeal from a judgment of the superior court for King county, Jurey, J., entered December 15, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action on a promissory note. Affirmed.

Roberts, Wilson & Skeel, for appellants.

Trefethen & Findley, for respondent.

MOUNT, J.—This action was brought to recover against the defendants on a promissory note for $13,727.45, together with interest and attorney's fees as provided for in the note. The complaint is in the usual form. For answer, the defendant Hans Pederson admitted making the note, but alleged that it was without consideration, and denied that there was anything due thereon. The defendants also, by way of a cross-complaint, alleged a conversion by the plaintiff of a mortgage for $100,000 on certain property in the city of Tacoma, and, by reason thereof, prayed for a judgment for $100,000 against plaintiff. Plaintiff, for

[1]Reported in 176 Pac. 542.

answer, denied any conversion of the mortgage. Upon these issues the case was tried to the court with a jury, and resulted in a verdict and judgment for the full amount claimed by plaintiff. The defendants have appealed from that judgment. The assignments of error are to the effect that the court erred in receiving certain evidence as to the financial condition of the owner of the property on which the mortgage was made, and in admitting witnesses to testify to the market value of the mortgage and of the property covered by the mortgage, and in refusing to permit certain witnesses to testify as to the value of the mortgaged property.

In view of our conclusion that there was no conversion of the $100,000 mortgage by the respondent, it will not be necessary to consider the evidence offered or received in reference to the value of the mortgaged property or of the mortgage. While there is some dispute upon the question of conversion of the mortgage, we think the evidence is plain that there was no conversion by the respondent, and the jury must have so found in order to have found the verdict for the full amount prayed for by the respondent in its complaint. The facts in relation to the conversion are substantially as follows: At the time the defendant Hans Pederson executed the note sued upon, he was the holder of a mortgage for $100,000 upon property then owned in Tacoma by the National Realty Company. This mortgage was a third mortgage upon the building and lots covered thereby. The first mortgage was for $275,000, and the second mortgage was for $20,000, with accumulated interest, amounting in all to nearly $40,000. This second mortgage was in point of time a third mortgage. It was executed and placed on record after the $100,000 mortgage now in question, but by agreement of the appellant Pederson

it was made a second mortgage upon the premises, subject only to the prior mortgage of $275,000 and prior to the $100,000 mortgage held by him.

After the execution of the note for $13,727.45 by Mr. Pederson, and after the assignment of the $100,000 mortgage as collateral security for the loan, Mr. Pederson concluded that the rentals being received upon the building owned by the National Realty Company were not being properly applied, and conceived the idea of having a receiver appointed to take charge of the property. He thereupon requested permission of the respondent to foreclose the $100,000 mortgage in the name of respondent. Respondent consented to this and permitted the appellant to employ counsel to foreclose that mortgage and to have a receiver appointed for the building. The action was thereupon begun, and the holder of the $20,000 mortgage was made a party to the foreclosure proceedings, and it was alleged that the $20,000 mortgage was subsequent to the $100,000 mortgage. In that action a receiver was appointed and took charge of the property. The foreclosure proceeding was prosecuted to final judgment, and at the foreclosure sale the property was sold, subject to the $275,000 mortgage, for a sum sufficient only to pay the $20,000, with interest and costs, which was adjudged prior to the $100,000 mortgage. There was nothing, therefore, to apply upon the $100,000 mortgage. Afterwards this action was brought by the respondent against the appellants upon the promissory note. While, as we have indicated above, there was some dispute as to whether the appellants had prosecuted the foreclosure action upon the $100,000 mortgage, we think it is plain that they did so and that the respondent declined to have anything to do with the foreclosure of that mortgage, but permitted the appellants, at appellants' request, to proceed with

the foreclosure of that mortgage in the name of the respondent. Upon that state of facts, which the jury must have found in order to arrive at the verdict in the case, we think it is plain that there was no conversion of the $100,000 mortgage by respondent, because there was no unauthorized disposition of the $100,000 mortgage by the respondent.

In order to constitute a conversion of the pledged property, there must have been a wrongful or unauthorized disposition of it by the pledgee. 31 Cyc. 836; 21 R. C. L. 675.

The evidence in the case decisively preponderates in favor of the respondent to the effect that the foreclosure proceeding was conducted by the appellant, and the loss of the $100,000 mortgage was his own fault, if fault could be attached to any one, and was not the fault or mismanagement or active participation therein by the respondent. In this view of the case, it is not necessary to consider the evidence which was received or refused by the trial court upon the value of the $100,000 mortgage or upon the value of the property, because, before that question could become material, it must have appeared to the jury that there had been conversion by the respondent. Since there was no conversion, and since the jury must have so found upon the evidence, it is now entirely immaterial what the evidence was on the question of value of the $100,000 mortgage.

The judgment must therefore be affirmed.

MAIN, C. J., FULLERTON, PARKER, and HOLCOMB, JJ., concur.

[No. 15041. Department One. December 16, 1918.]

TACOMA SAVINGS BANK & TRUST COMPANY, *Plaintiff*, v. HUGH HERREN, *Appellant*, R. E. WILLIAMS, *Respondent*.[1]

SALES (29)—CONSTRUCTION OF CONTRACT—SUBJECT-MATTER—"SURPLUS" HOPS. A contract to purchase 40,000 lbs. of hops, more or less, being all the "surplus hops grown on" specified yards, after delivery of 22,000 lbs. previously contracted to the buyer and 20,000 lbs. contracted to a third person, does not include any of the hops contracted to such third person; and the seller cannot repurchase from such third person and offer the same, on failure of the crop to produce the 40,000 lbs., more or less, in contemplation at the time of the sale.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered July 9, 1918, upon findings in favor of defendant Williams, in an action of interpleader, tried to the court. Affirmed.

Hayden, Langhorne & Metzger, for appellant.

Bates & Peterson, for respondent.

TOLMAN, J.—The appellant, a hop grower and dealer doing business in the Puyallup valley, on July 28, 1917, entered into a contract with one H. L. Hart by the terms of which he agreed to sell to Hart 22,000 pounds of hops then growing on the Query ranch, of which he was the lessee, at the price of twelve and one-half cents per pound. The last clause of the contract gave to appellant the right to deliver any part of the hops specified "from any prime western Washington hops." Shortly after this contract was executed, it was assigned by Hart to the respondent Williams, a hop broker of Portland, Oregon, who succeeded to all of Hart's rights thereunder. Previous to the making of this contract, appellant had contracted with one

[1]Reported in 176 Pac. 543.

Charles M. Metzler for the sale of 20,000 pounds of hops also to be grown upon the Query ranch, making a total of 42,000 pounds which the appellant had then contracted to sell from the product of this particular ranch, subject only to his right to deliver any prime western Washington hops on the junior contract. The average production of this ranch in previous years had been greater than this total. At this particular time appellant had a contract with one Laidlaw, by the terms of which Laidlaw was supposed to be obligated to deliver to appellant 8,000 pounds net of 1917 hops. On September 12, 1917, appellant entered into still another contract with the respondent, on the usual printed form, by the terms of which appellant agreed to sell, and respondent agreed to buy, 40,000 pounds of hops, more or less, of the 1917 crop, being grown by the appellant on the Herren ranch owned by him, at thirty-four cents per pound, delivery to be made between October 1 and 31 of that year. The blanks in the printed contract are so filled as to identify the place where the hops are being grown, the number of acres, the year in which grown, the amount, "more or less," the price and the time and place of delivery, and the amount of the advances; and there is added on the back of the form the following typewritten provisions which, as well as the contract proper, is signed by both parties thereto:

"Clause 11. The intent of this contract is that Hugh Herren sells and R. E. Williams buys all the surplus hops which shall be harvested in 1917 on the Herren hop yard, mentioned in the body of this instrument and the Query hop yard, near Alderton (leased to Hugh Herren) and also includes the 8,000 pounds contracted by Herren from H. D. Laidlaw of Alderton, after the delivery of 22,000 pounds previously contracted to H. L. Hart on July 28, 1917, from the Query yard and the yard mentioned in the body of this con-

tract and 20,000 pounds sold to Chas. M. Metzler from the Query yard."

The 1917 yield of hops appears to have been below normal. At any rate, there was harvested from the Query ranch but 22,500 pounds, and from the Herren ranch but 31,500 pounds, and for some reason not disclosed, the 8,000 pounds covered by the Laidlaw contract were not delivered to appellant, so that he had but 54,000 pounds of hops with which to fill all of his contracts. From the yield of the Query ranch, appellant first delivered 20,000 pounds to fill the Metzler contract, and he then immediately repurchased the whole thereof from Metzler. He then delivered 22,000 pounds to respondent in fulfillment of the Hart contract as assigned, and then tendered to respondent 31,500 pounds, being the full product of the Herren ranch, and demanded payment therefor at thirty-four cents per pound under the contract of September 12. Respondent accepted and paid for 11,500 pounds of the hops so tendered, and refused to accept the remaining 20,000 pounds, contending that, under clause 11, above quoted, he was not obligated so to do. To prevent unnecessary loss, the parties then entered into a stipulation reciting most of the facts herein stated, and providing that respondent should deposit $2,250 with the plaintiff herein to cover the appellant's loss, if it should finally be determined that the respondent should have accepted and paid for the 20,000 pounds of hops tendered at the contract rate of thirty-four cents per pound, and that the sum so deposited should abide the result of an action of interpleader to be brought by the plaintiff against both Herren and Williams. From findings and judgment against him, the appellant appeals.

The question before us is solely that of construing

the contract between the parties. The appellant contends, and it may be admitted, that the Hart contract did not bind the appellant to deliver any hops thereunder which had been grown on the Herren ranch, and that the recital to that effect contained in clause 11 of the contract of September 12 was erroneous. Yet, under his option to furnish any prime western Washington hops, he had the privilege of filling the Hart contract in whole or in part from the product of the Herren ranch, and when he signed the clause referred to, he apparently knew that the Query ranch would not produce the 42,000 pounds which he had then contracted therefrom, and elected to reserve the right to make up the shortage from the product of the Herren ranch. However that may be, we find no ambiguity in clause 11, for, in any event, by that clause—notwithstanding the appellant's right to fill the Hart contract from any prime western Washington hops without reference to the specific place where grown—respondent contracted to take only the product of the two ranches, less the 42,000 pounds covered by the previous contracts, plus the Laidlaw hops which were never delivered; and appellant cannot, by rebuying from Metzler, any more than by refusing delivery under the Metzler contract, change the terms of the last contract and make it include that which was specifically excluded.

The judgment of the trial court was right and must be affirmed.

MAIN, C. J., MITCHELL, MACKINTOSH, and CHADWICK, JJ., concur.

[No. 14952. Department Two. December 18, 1918.]

NELLO ZUCCONE, *Respondent*, v. MAIN FISH COMPANY, *Appellant*.[1]

MUNICIPAL CORPORATIONS (383)—USE OF STREETS—CONTRIBUTORY NEGLIGENCE. A motorcyclist, approaching a street intersection, at 12 miles an hour, is not guilty of contributory negligence, as a matter of law, in failing to avoid a collision with a motor truck, which was on the wrong side of the street, and first turned to the right as though to cross over, and then suddenly turned to the left without warning into the cross street.

SAME (379, 389)—USE OF STREETS—CROSSINGS AND PASSING—NEGLIGENCE—EVIDENCE—SUFFICIENCY. The jury is warranted in finding negligence on the part of the driver of a motor truck in approaching a street intersection on the left or wrong side of the street, and first swinging to the right as though to cross over, and then suddenly veering to the left to turn at the crossing, and colliding with a motorcyclist who was misled and unable to avoid the collision.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered March 16, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through a collision with a motor truck. Affirmed.

Benj. S. Ohnick and *Archie M. Major*, for appellant.

Jno. W. Arctander and *U. T. De Martini*, for respondent.

FULLERTON, J.—The plaintiff, while riding a motorcycle upon one of the streets of the city of Seattle, suffered personal injuries and damages to his machine as the result of a collision with a motor truck driven by an employee of the defendant. On a trial before a jury, there was a verdict for plaintiff, upon which judgment was entered. The defendant interposed motions for nonsuit, for judgment notwithstanding

[1]Reported in 177 Pac. 314.

the verdict, and for a new trial. The overruling of these motions and the entry of judgment on the verdict are assigned by the defendant as error.

The evidence of both parties shows that the collision occurred at the intersection of Dearborn street and Seattle Boulevard, the former street running east and west, and the latter crossing it diagonally in a course from northwest to southeast. The evidence on the part of the respondent, which the jury evidently believed, shows that he was riding northwesterly on the right side of the boulevard at a speed of about twelve miles per hour, when he observed the motor truck of the appellant approaching him, proceeding southeast along the same street or boulevard at about the same rate of speed; that both vehicles were on the same side of the street, that of the appellant being on the wrong side, under the city ordinances, by reason of its being upon the left side of the street according to the course pursued by it; that, as the two vehicles were approaching one another face on, the vehicle of the appellant was made to swerve to the right as if to cross over to the right-hand side of the street, which was the proper one for its course; that the driver for appellant, however, after swinging to the right, suddenly veered to the left in order to turn into Dearborn street, and that, at that time, the respondent was so close to the motor truck that he did not have sufficient opportunity to stop his machine and avoid a collision, though he made every effort to do so; that the motorcycle crashed into the truck just behind the forward wheel, and that the respondent was catapulted against the truck, suffering injuries to his chest and shoulders serious enough to require the services of a physician and to disable him from work for a period of eighteen days.

We are satisfied that it does not appear from these facts that there was any negligence, as matter of law, on the part of the respondent; while, on the other hand, the jury were warranted in finding that the driver of the appellant was at fault in being on the wrong side of the street and in veering his truck out of the course in which the respondent was proceeding, and then, without warning, swinging the truck back across the course of the respondent.

The appellant attempts to bring itself within the rule announced by us in *Jahn & Co. v. Paynter,* 99 Wash. 614, 170 Pac. 132, where we held that a motor vehicle first entering upon a street intersection and making a turn therein has the right of way, so as to avoid the charge of negligence against it in case of a collision with another vehicle entering the right of way immediately thereafter. But the instant case is distinguishable from the fact that the appellant was upon the wrong side of the street when it entered the intersection, and from the fact that the automobile driver, by his uncertain course in deviating first to one side and then swinging to the reverse, misled the respondent at a time when it was too late for him to avoid the collision.

The judgment is affirmed.

MAIN, C. J., PARKER, HOLCOMB, and MOUNT, JJ., concur.

[No. 14605. Department One. December 18, 1918.]

JOHN DAVIS & COMPANY, *Appellant*, v. VINCENT D. MILLER, VINCENT D. MILLER, INCORPORATED, *Respondents*.[1]

INJUNCTION (16) — TRADE SECRETS — SOLICITING CUSTOMERS BY FORMER EMPLOYEE. Equity will grant an injunction against the solicitation by a former manager, of the customers of a loan, real estate, and insurance agency, where he used his personal acquaintance with the customers and his knowledge of the agency's business and confidential matters as a reason for transferring their patronage to a competitor.

SAME (52)—ACTIONS—EVIDENCE—ADMISSIBILITY. In an action to enjoin the solicitation by a former manager of the customers of a loan, real estate, and insurance agency, it is error to exclude evidence of daily confidential meetings showing defendant's relation to plaintiff's business and the knowledge that he had acquired of it and of the customers while employed by it.

Appeal from a judgment of the superior court for King county, French, J., entered September 12, 1917, upon granting a nonsuit, dismissing an action for an injunction. Reversed.

Carkeek & McDonald, for appellant.

Kerr & McCord, for respondents, cited: *Flessher v. Carstens Packing Co.*, 81 Wash. 241, 142 Pac. 694; *New Method Laundry Co. v. MacCann*, 174 Cal. 26, 161 Pac. 990, Ann. Cas. 1918C 1022; *Du Pont De Nemours Powder Co. v. Masland*, 216 Fed. 271; *New York Towel Supply Co. v. Lally*, 162 N. Y. Supp. 247; *Peerless Pattern Co. v. Pictorial Review Co.*, 132 N. Y. Supp. 37; *Bossing v. Dorman*, 210 N. Y. 529, 103 N. E. 1121; *Stein v. National Life Association*, 105 Ga. 821, 32 S. E. 615.

MAIN, C. J.—This action was brought for the purpose of securing an injunction against the defendants,

[1]Reported in 177 Pac. 323.

restraining them from soliciting the customers of the plaintiff. At the conclusion of the plaintiff's evidence, the trial court granted a nonsuit and entered a judgment dismissing the action. From this judgment, the appeal is prosecuted.

The case has heretofore been before this court (*State ex rel. Davis & Co. v. Superior Court*, 95 Wash. 258, 163 Pac. 765), and it is only necessary here to state the facts briefly.

John Davis & Company, a corporation, the appellant, for many years prior to the institution of this action, was engaged in the real estate business in Seattle. This business consisted of four departments: rental, real estate, mortgage loan, and insurance. In the testimony the rental department is described as the "Hub" of the business. The respondent Vincent D. Miller had been in the employ of John Davis & Company since 1900, and from 1908 until November 1916 (when he left that company), he had been manager of the rental department. In the absence of the two leading officers of the corporation, Miller acted as manager thereof. As manager of the rental department, Miller came in personal contact with many, if not all, of the principal customers of the business. Immediately after leaving John Davis & Company, Miller organized the Vincent D. Miller, Incorporated, a corporation, and engaged in a competitive business with his former employer. When leaving the employment of John Davis & Company he induced two other employees, one of whom at least had a considerable acquaintance with the customers of John Davis & Company, to become employees of the Vincent D. Miller company. After the latter company had begun business, Miller and the two other employees referred to, under his direction, began a systematic solicitation of the customers of John Davis & Company to leave

that company and transfer their business to the Vincent D. Miller company. In the few weeks that elapsed before the institution of the present action, a large number of the customers of John Davis & Company were induced to transfer their business. Miller had a personal acquaintance with these customers which he acquired while employed by John Davis & Company, and in soliciting them to leave that company he referred to the fact of his personal acquaintance with them and the knowledge that he had of their properties which was acquired during his employment. Miller, when testifying, stated that he would continue to solicit the customers of John Davis & Company unless restrained. The solicitation was both oral and by means of letters or telegrams.

It was the practice of John Davis & Company, which was a large concern, to have a meeting of all of its employees every morning for a few minutes, at which meeting Miller presided. After this meeting, there was a second meeting, attended only by John Davis, Miller and one other employee. At the second meeting any prospective business that was not thought best to be discussed around the office generally was considered. An attempt to inquire fully into what further took place at this second meeting was met with an objection which was sustained by the trial court.

The action as originally brought sought both an injunction and damages, but upon the oral argument to this court the question of damages was waived; it therefore becomes a question whether the appellant is entitled to injunctive relief.

Before proceeding further, it should be stated that the question here is not whether Miller, being a former employee of the appellant, has a right to engage in a competitive business with that company in the same community; neither is it a question whether he has a

right to transact any business for the former customers of John Davis & Company which may come to him or his company voluntarily. The question is, however, whether Miller has a right to solicit the customers of John Davis & Company to leave that company and transfer their business to him, using as a reason therefor his personal acquaintance with them which he acquired while employed by John Davis & Company and the fact that he there looked after or managed their business.

There is no question but that equity will always protect against the unwarranted disclosure of trade secrets, confidential communications, and the like, and we do not understand this proposition to be controverted. There are a number of cases holding that the information which an employee upon a laundry, milk, or tea route acquires of the names and addresses of his employer's customers is confidential. In *Stevens & Co. v. Stiles,* 29 R. I. 399, 71 Atl. 802, 20 L. R. A. (N. S.) 933, the defendant had been employed by an optician to examine the eyes of patients and prescribe lenses. Before leaving this employment he copied from the books or records of his employer the names and addresses of those customers for whom he had prescribed while in that employment. After severing his connection with his employer, he sent circular letters to the persons whose names and addresses he had thus acquired, soliciting their patronage and business for a competitor of his former employer. It was there said:

"It is admitted that the respondent was in the employ of the complainant in its store, examining the eyes of patrons, prescribing glasses, and making records of the cases examined and treated, as also of prescriptions which came to the store from physicians outside. We do not see how such relations can be considered as other than confidential. As to the absence

of an agreement not to enter into competition with the complainant, it is sufficient to say that the decree does not enjoin such action on the part of the respondent. Particular stress is laid upon the claim that the only names copied from complainant's lists were those of customers whom the respondent personally examined, and it is argued that to copy and use such a list of names is not a breach of trust or a breach of confidence. The argument does not commend itself to us. It is elementary that what is done by the agent in the course of his employment is in the legal sense done by the master himself. The respondent could have no more right to copy records made by himself while acting for the complainant than he would have to copy any other records of the complainant to which he had access."

In *Robb v. Green*, 2 Q. B. Div. (1895) 315, the plaintiff was a dealer in live game and eggs. For the purpose of carrying on this business he occupied what was called game farms. The defendant for a time was manager of the business, and while in that employment copied a list of the names and addresses of the customers. Subsequently the defendant became associated with a rival business and sought to solicit the customers of his former employer. It was there held that it was an implied term of the contract of service that the defendant would observe good faith towards his master during the existence of the confidential relation between them, and that the defendant's conduct was a breach of that contract.

Running through the cases will be repeatedly found the statement that, where an employee, after severing his connection with his former employer, makes use of trade secrets or confidential information which he acquired during his employment, in a competitive business, it results in what is called unfair competition and will be restrained.

In each of the two cases above cited, it will be noted that a copy was made and taken away when the employment ceased. In this case Miller did not take away a copy of the list of the customers of John Davis & Company and their addresses, but he testifies that the names of the customers were in his "head" and he knew where to get the addresses. Whether the information was carried away, first having been reduced to writing, or carried away in the memory can make no difference. In *People's Coat, Apron & Towel Supply Co. v. Light,* 171 App. Div. 671, 157 N. Y. Supp. 15, speaking upon this question, it was said:

"There is no evidence that Light had a written list of them (customers). There was in his head what was equivalent. They were on routes, in streets, and at numbers revealed to him through his service with plaintiff. Their faces were familiar to him, and their identity known because of such employment. He had entry and introduction, and solicited them, not as strangers, but as persons known to him. He used what he had gained through plaintiff to take away its customers."

In the present case, Miller used what he had gained while in the employment of appellant to take away its customers, and asserted that he would continue to do so in the future unless restrained. The business of his former employer had been built up through many years by the practice of industry, expenditure of money, and the exercise of judgment. It certainly would be unfair competition for Miller, after leaving the employment, to use his acquaintance with the customers of that company there acquired and the knowledge of the business which he there transacted as a reason why such customers should transfer their business to him or his company. In our opinion, the trial court erred in granting the nonsuit.

Certain New York cases have been referred to. It must be admitted that the cases referred to in the New York Supplement are not entirely harmonious. In *Boosing v. Dorman*, 210 N. Y. 529, 103 N. E. 1121, a judgment of the supreme court of that state in favor of the defendants was affirmed without discussing the question. In that case, however, it was held, as pointed out in the appellate division of the supreme court (148 App. Div. 824, 133 N. Y. Supp. 910), that the defendant would not be "perpetually" restrained from soliciting customers of his former employer. The question of the duration for which an injunction might properly issue cannot well be considered in this case at the present time, since the case was disposed of by the trial court in granting a nonsuit, and it must be returned for a new trial.

There are other points, two of which will be briefly referred to. One is urged by the appellant and the other by respondent. The appellant claims that it was error to refuse to permit it to inquire into what took place at the second meeting, above referred to in the office of John Davis & Company when there would be present only Davis, Miller and another employee. This testimony should have been admitted. The nature of Miller's relation to the business of his employer and the knowledge which he acquired of that business and of its customers while there employed was a proper subject of inquiry. It may be that there is not sufficient merit in this point to justify a reversal if the case had been fully tried, but since the case must be retried, it seemed best to suggest the proper ruling. The respondents contend that the entire action was predicated upon the charge of conspiracy, and since that failed, the court was justified in granting the nonsuit. The complaint did charge conspiracy, but it also, aside

from that, stated a cause of action for unfair competition. The case of *Flessher v. Carstens Packing Co.*, 81 Wash. 241, 142 Pac. 694, is not in point. In that case the action was founded upon negligence in selling poisoned or diseased meat. In submitting the case to the jury, the trial court disregarded the allegations of the complaint and instructed that the liability of the defendant was to be determined under the provisions of the pure food act. It was there held that the character of the action was determined by the allegations of the complaint, which contained no mention of any violation of the statute.

Some of the other points discussed in the briefs would be material if either the question of damages or of conspiracy were still in the case. Since these questions are not now pressed, it seems unnecessary to review points which would relate to them alone.

The judgment will be reversed, and the cause remanded with directions to the superior court to grant a new trial.

FULLERTON and CHADWICK, JJ., concur.

[No. 14541. *En Banc.* December 19, 1918.]

In the Matter of the Estate of AGNES GEISSLER. AGNES M. WEBER, *Respondent,* v. FRANK J. GEISSLER *et al., Appellants,* IRENE MAY GEISSLER, *Respondent.*[1]

APPEAL (149)—PRESERVATION OF GROUNDS — EXCEPTIONS — FORM AND SUFFICIENCY. Exceptions to findings, orally announced at the time the findings were made, are not inconsistent with orderly practice, and may be sufficient to warrant a review on appeal, notwithstanding that a showing of failure to specify the particular findings excepted to is supported by the court's failure to note the exceptions at the time.

WILLS (7)—TESTAMENTARY CAPACITY — EVIDENCE — SUFFICIENCY. The evidence sustains findings of mental competency and lack of duress or undue influence in the making of a will, where, sick unto death, and at times delirious and under the influence of drugs, the testatrix made a will in favor of her husband, named all her children, giving each $50, and the evidence of those in attendance was to the effect that her mind was clear and that she had a perfect understanding of her property; since wills are favored in the law and the testimony to overthrow them must be cogent and convincing.

Appeal from a judgment of the superior court for Adams county, Truax, J., entered September 25, 1917, upon findings in favor of the plaintiff, in an action to contest a will, tried to the court and a jury. Reversed.

W. M. Nevins and *Merritt, Lantry & Merritt,* for appellants.

Zent & Powell, for respondent.

CHADWICK, J.—Agnes Geissler died January 27, 1916, in Adams county, Washington. She left a will which was admitted to probate on the 13th day of March, 1916. On the 29th day of September, 1916, Agnes M. Weber, daughter of the deceased, filed a

[1]Reported in 177 Pac. 330.

petition in the superior court asking that a citation issue to the executor and the heirs and devisees of her mother to show cause why the will should not be set aside and held for naught upon the ground that the will had been executed at a time when her mother was mentally incompetent to understand the contents of the will; that she did not sign it as her free and voluntary act, but at the dictation and under the menace, duress, fraud and deceit of Frank J. Geissler, her husband, to whom the property was all left, save a specific legacy of $50 to each one of her children, including the contestant.

The petitioner further alleged that it was the wish and desire and purpose of her mother, when in her right mind and in the full possession of her mental faculties, to distribute her community interest in the property among her four children, share and share alike. The facts will be argued in the body of the opinion. The first question confronting us is whether the case is properly before us, it being urged by counsel for the contestant, in whose favor judgment was entered, that counsel for the contestees did not save any exceptions to the findings made by the court. The history of this feature of the case is fully outlined in our opinion in *In re Geissler's Estate,* 99 Wash. 452, 169 Pac. 822. It is there suggested that the question should be passed to the merits. Without further discussion we hold, in aid of our appellate jurisdiction and upon the showing made, that counsel for the contestees announced to the court, at the time findings were made, that they excepted to such findings; this being not inconsistent with orderly practice, and counsel being experienced lawyers familiar with appellate practice. The showing on the other hand would indicate that, although it was announced that exceptions were reserved, counsel did not specify the particular

findings to which they excepted. This position is sustained in that the trial judge did not note the exceptions at the time. The conflicting certificates of the trial judge are referred to in our former opinion. This being the state of the record, and being disinclined to deny an appeal where we are convinced that both sides are sincere, and that the situation comes not from neglect or a selfish disposition to deny a right, but from a misunderstanding, we are inclined to hold that the case is properly before us.

The contestant produced the attending physicians, Dr. Ganson and Dr. Burroughs, who had been called in consultation on the day that the will was executed, as witnesses. As suggested in our former opinion, the case was tried before a jury, which found in favor of the contestant. The trial judge adopted the findings of the jury, but also filed a memorandum of opinion in which he says that the testimony clearly preponderates in favor of the mental capacity of the deceased at the time the will was executed, if we are to reject the testimony of the physicians. Counsel for the contestees persistently objected to the admission of the testimony of the physicians, claiming that they came within the rule of privilege as declared by Rem. Code, § 1214.

It was held below that the contest of the will, being a matter in probate, was not a civil action within the meaning of the statute, and that the physicians were therefore qualified.

Much of the briefs is made up of an argument of this question, but being convinced that the facts preponderate in favor of the will, with as well as without the testimony of the physicians, we will pass that question and consider the case as if the physicians were unquestionably qualified.

Mrs. Geissler had been sick for about a year. She

had gone to Spokane in the fall for an operation. When the doctors came to operate they found her condition to be such that the hope of benefiting her was abandoned and she was moved back to her home. The operation revealed a cancerous condition of the uterus, bladder, and pelvic organs, from which uremic poisoning developed. This condition, according to the testimony of Dr. Burroughs, brings on convulsions which are followed by coma; that is, stupor and insensibility. It is in evidence, too, that the attending physician had prescribed morphine and hyoscin, and that these remedies would benumb the nervous system and impair the acumen of the mind and cause hallucinations and drowsiness when coming out from under the influence of the drugs.

Of her mental condition, the attending physician, Dr. Ganson, testified in a general way:

"She was usually able to recognize me. Her mental condition was quite misleading. At times I would think she was quite rational, and then she would go off to one of those periods of flightiness. She was conscious but delirious."

The will was executed on the afternoon of December 22. The doctor says:

"She met Dr. Burroughs and shook hands and talked to him. She knew Dr. Burroughs and she knew me, but I had talked to her in the morning and she was delirious at that time."

To the direct question whether she was in such mental state as to know her property, her will, and the object of her bounty, Dr. Ganson says:

"I had no means of knowing positively as to whether she was under this influence or not. She knew part of what she said, and at the same time in the same conversation she would go off into a delirium, so it was impossible for me to tell whether she recognized these things or not."

And on cross-examination he testified:

"Q. Doctor, do you think from what you saw of her at that time, do you think that, on the morning of the 22nd, she would be in such a condition of mind as to know her relatives and know what property she had? A. I don't know. Q. You would not say that she was not in that condition of mind? A. I would not say that she was not. No, sir."

To a like general question, Dr. Burroughs answered:

"A. I think that comes under the head of expert witnesses and I don't know as I care to qualify as an expert. Q. We have both expert and inexpert. Just simply give your opinion, Doctor, as to what the situation was. A. In my opinion, she was not."

And upon cross-examination he testified:

"Q. But is there at any time a time in a patient who is in a state of uremic poisoning when the effect of it might pass off, and the mind be clear? A. There might be at intervals. Q. Would you say, on the morning of the 22nd of December, 1915, that Mrs. Geissler was not in a condition to know her children? A. I did not know her condition in the morning. I saw her in the afternoon. Q. From what you saw in the afternoon, state whether or not, in your opinion, she would be in such condition on the morning of the 22nd of December as to know her children? A. Probably she would at intervals. Q. And her husband? A. She probably would. Q. And to know what she desired to do with that property? A. She might do that."

On re-direct examination to the question, "That would be possible, but not probable, as I understand it?" Dr. Burroughs said: "I guess that's it."

Wills are favored in the law, and it is a cardinal principle of construction that the testimony to overcome them must be cogent and convincing. The testimony of all of those who were in attendance at the time the will was executed is to the effect that Mrs. Geissler's mind was clear and that she had perfect un-

derstanding of her property and the disposition that she desired to make of it. Upon the suggestion of the draftsman of the will that it would be necessary for her to make some provision for her children, she named each of them giving their ages. She also made reference to a child that had died and had been buried a day or two before, suggesting that it would not be necessary to leave anything to him. She had stated to other witnesses that, inasmuch as she and her husband had earned the property together, she wanted him to have the whole of it when she died. Neighbors who saw her during her illness generally concur that she was competent and, barring the time when she was under the influence of the drugs which were given her from time to time to allay her pain and suffering, that her mind was bright and active. The nurse who was in attendance upon Mrs. Geissler testified that she was present when Mrs. Geissler signed the will and that "she was in a right clear state of mind at the time she signed it." It was her opinion that she well knew her own mind, her property, and what she desired done with it after her death.

An expert physician was called and, upon a hypothetical question covering the facts of the case, expressed the unqualified opinion that Mrs. Geissler was in a competent mental condition. The only testimony to the contrary is the testimony of the contestant and her husband and of some witnesses whose testimony is little more than hearsay.

The charge that Mrs. Geissler was acting under duress or was the victim of fraud and deceit was not sustained in any degree. Nor do we find anything in the record that would sustain a finding that Mrs. Geissler had ever said that she intended to leave her property to her children. But if she had, being competent, she was privileged to change her mind. Nor

can an inference of incapacity be drawn from the fact that she left her property to her husband. Her act was neither unnatural nor unusual. On the contrary, it is quite common under our community property system for one spouse to will the entire estate to the other, a fact of which we might well take judicial notice if the issue were otherwise doubtful.

There are two circumstances that are urged as evidentiary facts having a sufficient weight to influence the judgment of this court. The one is that Mrs. Geissler, when writing her signature to the will, wrote the name Geissler, G-e-i-s-s-s-l-e-r, and that this misprision would indicate an imperfect or non-understanding mind. But the testimony shows that Mrs. Geissler herself immediately called attention to the fact, saying: "I have gone and put one too many s' in it," and asked how her error might be corrected. The draftsman, the banker at Odessa, an old and familiar friend, suggested that she draw her pen through the misspelled signature and write her name below. This she did. The signature is written in a bold, clear hand. There are no evidences of tremor or hesitation. Looking at her signature it would be hard to believe that Mrs. Geissler could have written a plainer, better hand were she entirely well; or, to state it in another way, she could not have written her name as it is written if she were delirious or under the influence of drugs, or a subject of duress.

The other circumstance is the alleged change in form of a receipt for money. The contestant was paid $40, for which Mr. Geissler took her receipt. Contestant claims that this $40 was a loan. Mr. Geissler insists that it was the balance of her legacy. He had previously paid her $10. The receipt has written in it "In full for inheritance." It is contended that the words "In full for inheritance" are in a different hand-

writing and were inserted fraudulently by Mr. Geissler and his daughter Emily. It is agreed that the receipt was in other respects written by the contestant, Agnes Weber. But we are of the opinion that we are not called upon to settle this controversy. It may be true, and it may be that the jury which was called to advise the court were in some degree influenced by the fact, that the words complained of were, as certain expert witnesses believe, written by the contestant's sister, Emily. But this is a collateral question and can have only slight, if any, bearing upon the main question whether Mrs. Geissler was in a disposing state of mind at the time the will was executed. What may have been done three months after her death by any of the parties can have no effect unless, if the collateral fact were proven, it would tend to discredit the testimony of Mr. Geissler and his daughter. But since there is abundant testimony to sustain the will without resorting to the testimony of either of these witnesses, it would do violence to settled principles to reject that which is fairly certain for that which may forever remain a matter of doubt.

The judgment of the lower court is reversed, and the cause will be remanded with directions to administer the estate under the will.

MACKINTOSH, HOLCOMB, MITCHELL, and MOUNT, JJ., concur.

[No. 14408. *En Banc.* December 28, 1918.]

HOTEL CECIL COMPANY, *Appellant*, v. THE CITY OF SEATTLE, *Respondent*.
W. J. MCLAUGHLIN, *Appellant*, v. THE CITY OF SEATTLE, *Respondent*.[1]

MUNICIPAL CORPORATIONS (405) — TORTS — OF POLICE OFFICERS — ABATEMENT OF NUISANCE—LIABILITY—PLEADING. A complaint alleging that a city, "through its duly constituted officers, determined" that plaintiff's place of business constituted a nuisance, will not by inference be considered as alleging that any court of the city, or that the city council by ordinance, had determined the fact; in view of Rem. Code, § 287, as to the manner of pleading such a determination, and § 291, providing for the pleading of an ordinance by title and date of passage.

SAME (405). A complaint alleging the abatement and destruction, by police officers acting as agents of the city of Seattle, of plaintiff's place of business as a nuisance, without alleging affirmative action by the city council, is subject to general demurrer, in that it fails to allege that the officers represented the city acting for itself in its corporate, as distinguished from its governmental (and nonliability) capacity; in view of Rem. Code, § 7507, subd. 31, including, in the enumeration of corporate powers, for which the city would be liable, the power to declare nuisances and abate the same, and of Seattle charter, art. 4, § 18, subd. 31, providing that the city may, by ordinance and not otherwise, declare nuisances and provide for the abatement of the same.

Appeal from a judgment of the superior court for King county, Ronald, J., entered September 6, 1917, upon sustaining a demurrer to the complaint, dismissing consolidated actions for damages. Affirmed.

Vanderveer & Cummings and *Piles & Halverstadt*, for appellants.

Hugh M. Caldwell, Thomas J. L. Kennedy, and *Hugh R. Fullerton*, for respondent.

MITCHELL, J.—These two cases, practically identical as to the facts stated in the complaints, so far as the

[1]Reported in 177 Pac. 347.

law governing them is concerned, were consolidated in the trial court for the sake of convenience, and are so presented here. We use the case of the Hotel Cecil Company, a corporation, appellant.

According to the complaint, appellant, a private corporation, on December 8, 1916, was the owner of a restaurant and grill room in Seattle. The complaint states:

"On the 8th day of December, 1916, the defendant, through its duly constituted authorities, determined that said place of business of this plaintiff constituted a nuisance, and directed its summary abatement as such, and on said day, in pursuance of such purpose, and in the exercise of such power and authority as was vested in it by reason of the premises, the defendant, through a squad of its police officers, completely wrecked the plaintiff's said place of business, and utterly demolished all of the personal property of the plaintiff therein contained."

The complaint further states that appellant's place of business was not a nuisance nor conducted as such. It alleges damages, and that, within the time limited by the city charter, it filed a proper claim for damages, and that such claim was rejected by the respondent. The claim referred to and made a part of the complaint states as follows:

". . . On December 8th, 1916, at 1:30 o'clock a. m., a squad of police officers of the city of Seattle, purporting to act under and by virtue of some authority and warrant of law vested in them by said city, and acting under the express authority of the mayor of said city and the chief of police of said city and the other duly constituted authorities of said city, appeared at this claimant company's place of business aforesaid . . . Thereupon said police officers at said time and place . . . under and by virtue of some purported authority and warrant of law vested in them by said city, and under the express authority and war-

rant of law vested in them by said city, and under the express authority of the mayor, the chief of police and other duly constituted authorities of said city, proceeded to, and did, wreck, smash, break, tear out, completely demolish and destroy, or render utterly valueless, the property of this company hereinafter mentioned and described, and claimed by the said authorities to constitute a nuisance as aforesaid, to wit:"

There follows a description and value of the personal property destroyed and the allegation that the place was not a nuisance nor used as such.

A demurrer containing six different grounds was interposed by respondent. It was sustained. Appellant chose to stand on the complaint, and judgment of dismissal was entered, from which the appeal is taken. The case is argued here on the general demurrer.

The main point in the case is suggested by that portion of the complaint which is as follows:

"the defendant, through its duly constituted authorities, determined that said place of business of this plaintiff constituted a nuisance, and directed its summary abatement as such . . . and in the exercise of such power and authority as was vested in it by reason of the premises, the defendant, through a squad of its police officers, completely wrecked plaintiff's said place of business, etc."

This language is not clear as to what is meant by "its duly constituted authorities," nor by the word "determined." Much favor is extended to the allegations of a complaint tested by general demurrer. Obviously, however, the complaint must not be taken as alleging that any court of the city *determined* that the place was a nuisance, for it is not so stated as would be required by § 287 of Rem. Code. Nor can it be considered to have been *determined* by the city on account of any ordinance, because Rem. Code, § 291, provides for the pleading of an ordinance (by its title and date

of passage) to convey to the court knowledge of the existence of such ordinance, and the tenor and effect thereof.

The controlling question in the case is whether or not the officers charged with having destroyed the property acted as agents of the city with respect to its corporate duties and functions as contradistinguished from those relating to the general public. If the first, the rule of *respondeat superior* applies; if the latter, the city is not liable.

On calling attention to the statutory remedies against public nuisances, consisting of indictment or information, a civil action and abatement, counsel for appellant contend that the city having elected to pursue abatement, it should be held liable for its acts if it destroyed property which was not in fact a nuisance. Supporting such view, citation is given of a note on page 884, Cooley's Constitutional Limitations, 7th ed. (in that portion of his work discussing "The Police Power of the State"), as follows:

"If a municipal corporation proceeds to abate a nuisance, it possesses for that purpose only the rights of any private person, and if injury results to an individual, it must justify its action by showing that a nuisance existed in fact."

Concerning the matter being immediately inquired into, viz.: governmental and corporate functions, one will not quite appreciate the note quoted without understanding the cases furnished in its support, only two of which need be noticed. First, the case of *Welch v. Stowell,* 2 Doug. (Mich.) 332. It is a case of demolishing a house occupied as a house of ill-fame, and the court held the *agents* and *officers* of the city liable for the destruction of the building, on the theory that only the manner of using the building and not the building itself was subject to abatement. But for the

purpose of showing the reason for holding the *officers* of the city liable for destroying the building, the opinion calls attention to an act of the legislature conferring on the city council:

"Full power and authority to make all such by laws and ordinances, as may by the said common council be deemed expedient for effectually preventing and suppressing all disorderly houses, and houses of ill-fame," pursuant to which grant of power the city council passed an ordinance entitled: "An ordinance to suppress disorderly houses and houses of ill-fame," the second section of which provides:

"When any such house or building, so occupied, shall be deemed by the common council to be a common nuisance, it shall be competent for said common council to abate such nuisance, by ordering such house or other building to be pulled down and removed, etc."

And further, that afterwards the council, by resolution, declared and adjudged the plaintiff's house to be a nuisance, and empowered and directed the city marshal to proceed and demolish it, which was done by the defendants, one of whom was the city marshal, the others assisting him. Thus there was liability here, not simply because section two of the ordinance reached too far in authorizing the destruction of the building, but also because, by the act of the legislature, the city ordinance and its resolution ordering the destruction of the building, the city had taken charge of the matter in its corporate capacity and was not acting in a governmental way for the general public. The defendants, as officers and agents of the city, acted pursuant to specific, formal corporate authority.

Secondly, and to the same effect, is the case of *Mayor etc. of Americus v. Mitchell*, 79 Ga. 807, 5 S. E. 201, where, upon the report and recommendation of the board of health, the mayor and *council* had declared and determined the thing in dispute (mill pond) to be a

nuisance and dangerous to health and ordered it abated. The owner sought to enjoin the city, alleging the pond was not a nuisance. The court held the determination by the health officers and the city council entitled the city to abate the nuisance, on the theory that delay might endanger the public health, but if the city did abate it it would be at its peril, and that if the owner, in a suit at law, could show the pond was not a nuisance, the city would be liable to damages. The city, in this case, it is to be noticed, was acting for itself under its own ordinance, and not for the public at large.

Counsel next call attention to that portion of the case of *Yates v. Milwaukee,* 10 Wall. (77 U. S.) 497, wherein the court uses this language:

"It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or state, within which a structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business and all the property of the city, at the uncontrolled will of the temporary local authorities."

It was a case to enjoin the city from removing a wharf. Examination of it shows that the legislature of Wisconsin had enacted a law which authorized the common council of Milwaukee, "*by ordinance,* to establish dock and wharf lines upon the banks of the Milwaukee and Menomonee rivers, restrain and prevent encroachments upon said rivers and obstructions thereto."

The pleadings and proof in the case are silent as to whether the city council ever passed an ordinance to establish wharf and dock lines under the authority of the statute. But the city, by its common council, and

not by its executive or administrative officers or agents, by *ordinance,* declared and determined the particular wharf to be an obstruction to navigation and a nuisance, and ordered its abatement—thus exercising municipal or corporate functions. The case simply announces the rule that a person supposed to be aggrieved, or even a city, without some general law of the state or city by the terms of which a structure can be shown to be a nuisance, will not be allowed, by its mere declaration that the structure is a nuisance, to subject it to removal. It assumes that the city shall declare the thing to be a nuisance, and then assures us that such declaration will not of itself make the thing a nuisance or justify its removal. But the case at bar presents no such inquiry.

The sole question here is, does the complaint show on its face that the *City of Seattle* is liable, admitting that appellant's business and property did not constitute a nuisance and should not have been destroyed or damaged. There is, however, another portion of the opinion in the case just referred to worthy of notice, as to the matter of pleading, viz.: having in mind the fact that the legislature of Wisconsin had authorized the city of Milwaukee, "by ordinance, to establish dock and wharf lines, etc." the court said:

"It is true that it is said in argument that the city council has established a wharf and dock line under the authority of the statute we have cited and that Yates' dock projects beyond that line. No such defense is set up in the answer, and the existence of such a line, being a matter of which the court could not take judicial notice, it cannot be taken into account here."

So here, the complaint does not advise one if the city council of Seattle, by ordinance, has ever defined nuisances, a power conferred by statute, as we shall later

notice, or determined that appellant's place of business or property constituted a nuisance.

Attention is called to the case of *Sings v. Joliet,* 237 Ill. 300, 86 N. E. 663, 127 Am. St. 323, 22 L. R. A. (N. S.) 1128, spoken of by appellant as *a leading case.* Under a statute of Illinois providing the city council shall have power "to declare what shall be a nuisance and to abate the same," the city of Joliet, without any general ordinance on the subject, passed a special ordinance declaring the building in question to be a nuisance and ordered its abatement. Plaintiff sought to enjoin the enforcement of the order of abatement. The court disfavored injunctive relief out of respect to the judgment and discretion lodged in the municipal authorities in cases of emergency and necessitous circumstances, but held that, in such case, the city acted at its peril, so that if, in fact, the building was not a nuisance, and so proven in an action for damages, the city would be liable. This is the same doctrine as that announced in the case of *Mayor etc. of Americus v. Mitchell, supra.*

Subsequent to the argument in this court, counsel for appellant, still insisting, furnished additional authorities on the subject, "If a municipality destroys property, under its power to abate nuisances, which is not a nuisance, it is liable for the value of the property destroyed." We notice two of these cases.

First, is the case of *City of Orlando v. Pragg,* 31 Fla. 111, 12 South. 368, 34 Am. St. 17, 19 L. R. A. 196. Pragg sued the city of Orlando in trespass, alleging that, while

"he was engaged in the business of a dealer in natural curiosities, and had attached to his shop a museum for the exhibition of live and stuffed animals of various kinds for profit; . . . the said defendant by and through its mayor, *city council,* servants, agents

and employees, entered upon the premises of plaintiff . . . and without just cause, removed and destroyed property, etc."

Upon issues by the city, the proof showed that the city board of health had condemned the place and reported the same to the city council, whereupon the city council declared the place a nuisance and ordered it abated. After notice and failure of the owner to remove, the city marshal removed the nuisance. The court announced the rule of liability of the city in an action at law if in fact there was no nuisance.

Secondly, the case of *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100, 23 Am. St. 850, 10 L. R. A. 116. This is a case of the killing of a horse claimed by the authorities to have glanders. Plaintiff alleged, and the court found, that the horse did not have glanders. Prior to suit it was ordered that the horse be killed because of an official report to, and by formal action of, a board which, by an act of the legislature, was specifically empowered to pass upon such matters. The action was in tort against the persons who killed the horse.

It would be unprofitable to review all or other of appellant's authorities in this opinion.

On the other hand, the city, in the case at bar, contends that, in acting as it did through its officers, it was performing governmental and not proprietary or corporate functions, and hence is not liable.

In extending powers to cities of the first-class, such as the city of Seattle, Rem. Code, § 7507, provides:

"Any such city shall have power . . . 31, to declare what shall be a nuisance, and to abate the same, and to impose fines upon parties who may create, continue, or suffer nuisances to exist."

The large number of powers enumerated, including this one, are granted not to the executive or to the ministerial officers of the city, but to the city, obviously for

the purpose of exercising corporate and municipal authority and control, and the city, when acting for itself in exercising these powers, does so through ordinance or formal declarations of its council. Again, by another law, § 7494, such city as Seattle may have a charter of its own, and accordingly Seattle has framed and adopted a charter. It provides, article 4, section 18, subd. 31, as follows:

"The city council shall have power by *ordinance and not otherwise* . . . thirty-first. Abatement and Punishment of Nuisances:—to declare what shall be a nuisance and to provide for the abatement of the same, and for the punishment of any person or party who may create, continue or suffer a nuisance to exist."

Of what benefit to the inhabitants of the city shall this safeguard in its charter be if its provisions may be ignored? For, as already pointed out, because of the silence on the subject of any city ordinance, the complaint must be considered as not alleging any act on the part of the city council, which is *the city*, if it is to be holden in this case in its corporate character.

In addition, the point in question, on principle, is not new in this state. It has been decided adversely to appellant's contention. In the case of *Howard v. Tacoma School District No. 10*, 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917D 792, Judge Ellis, writing the opinion, says that, in the face of rather strong argument, the court still adheres to its well established view that *a school district* is liable for negligence in the performance of governmental duties, while a *municipal corporation proper* is not liable in such case, but is only liable for negligence in the performance of proprietary or corporate duties. The opinion says:

"We have repeatedly held that an incorporated town or city is not liable where injury occurs through negligent performance or omission of performance

connected with its purely governmental functions, thus according to the municipality the sovereign immunity of the state. *Lawson v. Seattle,* 6 Wash. 184, 33 Pac. 347; *Russell v. Tacoma,* 8 Wash. 156, 35 Pac. 605, 40 Am. St. 895; *Lynch v. North Yakima,* 37 Wash. 657, 80 Pac. 79, 12 L. R. A. (N. S.) 261; *Cunningham v. Seattle,* 40 Wash. 59, 82 Pac. 143, 4 L. R. A. (N. S.) 629; *Cunningham v. Seattle* (rehearing), 42 Wash. 134, 84 Pac. 641, 4 L. R. A. (N. S.) 629."

Counsel for appellant, cognizant of this rule, seek to turn aside its application here because this is not a case of *negligence,* but one in which the city has taken or damaged and destroyed property. In the first place, such contention assumes and takes for granted the very thing in dispute, viz.: that the city as such, in its corporate and private capacity, did these things. We have already noticed there is no charge or allegation in the complaint that the city, by that plan which it must follow, ever declared a purpose to take or damage the property or directed its officer to do so. Again, for ascertaining the test as to whether the city is acting governmentally, and hence immune from liability, what difference in reason can there be whether the action be that of negligence or trespass?

In the case of *Simpson v. Whatcom,* 33 Wash. 392, 74 Pac. 577, 99 Am. St. 951, 63 L. R. A. 815, a plaintiff sued the city of Whatcom for damages for false imprisonment caused by his arrest under an ordinance declared void by the court on appeal from a conviction in the police court. This court, Judge Dunbar writing the opinion, says:

"The controlling question in all this character of cases is whether or not the officers, to whom are attributed the delinquencies which resulted in the damage alleged, are the agents of the city. If they are, then the doctrine of *respondeat superior* applies, and the city is liable; if not, otherwise."

Then, after referring to the perplexing distinction between corporate duties and public duties, the rule is announced as follows:

"We think, however, this general deduction may be made: that whenever the damaging action or the neglect of the officer arises in the execution of a duty which is for the exclusive benefit of the city, the city is liable; but if the duty, in whole or in part, is one imposed upon the city as a public instrumentality of the state, the city is not liable."

Thus it appears clear that the test of liability is, does the act arise in the execution of a duty which is for the exclusive benefit of the city, rather than whether it is an act of *negligence or trespass of the officer,* for the language is, "whenever the damaging action *or* the neglect of the officer arises, etc."

The trial court clearly observed and applied the proper rule in these cases.

The judgment in each case is affirmed.

MAIN, C. J., MOUNT, HOLCOMB, TOLMAN, and PARKER, JJ., concur.

[No. 14792. Department One. December 28, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. W. S. WALKER, *Appellant*.[1]

WITNESSES (84)—CROSS-EXAMINATION OF ACCUSED—SELF-DEFENSE. Upon an issue of self-defense, the state is entitled to show by cross-examination that the accused, after an altercation, had found a safe asylum by going to his garage and locking the door, where he obtained a gun with which he shot the deceased, indicating a voluntary return to the fray.

CRIMINAL LAW (387)—APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS TO EVIDENCE. Error cannot be predicated on the failure to lay sufficient foundation for a dying declaration, in the absence of any objection to the evidence upon that ground.

CRIMINAL LAW (229)—HOMICIDE (88)—TRIAL—RECEPTION OF EVIDENCE—SCOPE OF REBUTTAL. Where the accused testified to a conversation had with the deceased just prior to the killing, it is proper rebuttal for the state to call the wife of the deceased and give deceased's account of the conversation repeated to her in his dying declaration, under a sense of impending death.

CRIMINAL LAW (314)—HOMICIDE (95)—TRIAL—NECESSITY OF PARTICULAR INSTRUCTIONS—DYING DECLARATIONS. It is not error to fail to instruct that dying declarations should be received with caution, in the absence of any request therefor; there being a wide distinction between misdirection and nondirection, where the charge is not mandatory by statute.

Appeal from a judgment of the superior court for King county, Ronald, J., entered November 9, 1917, upon a trial and conviction of manslaughter. Affirmed.

Marion A. Butler and *A. C. Hough*, for appellant.

Alfred H. Lundin and *Everett C. Ellis*, for respondent.

CHADWICK, J.—Appellant had testified on cross-examination that, after an altercation with the deceased in which blows had been exchanged, he had gone into his garage and obtained the gun with which he shot

[1]Reported in 176 Pac. 315.

the deceased. On cross-examination, he was interrogated and answered as follows:

"Q. There was no way he could have gotten in? (referring to Sandulli). A. He might have gotten in. Q. Didn't you have any way of locking the door? You came in from the back? A. There was a way. It could be locked. Q. So, if you were running away from him because you were afraid of him, you were absolutely safe when you got inside of that building, weren't you? Isn't that right? Absolutely safe when you got inside there? A. No, not absolutely safe. Q. Your front door was locked, so he couldn't get in there?"

Counsel maintain that appellant was thus deprived of the benefit of his plea of self-defense, in that it put a duty of retreating further than the law requires upon him, the theory being that a man may retreat to his castle, but is not compelled to lock his door. We find no error in this regard, appellant having testified to a fear sufficient to exonerate his act under a plea of self-defense. It was proper for the state to show on cross-examination that he had found a safe asylum, and that his conduct was such that the jury might conclude that his return to the fray was voluntary and not under a necessity arising out of a sense of personal insecurity.

When upon the stand appellant testified to a conversation had with the deceased just prior to the killing. The wife of the deceased was called in rebuttal and was asked whether her husband had repeated the conversation to her. After preliminary examination in the absence of the jury, the court, admitted the testimony as a dying declaration. Error is predicated upon two grounds: that no sufficient foundation had been laid, and that it was not proper rebuttal. The woman is a foreigner and her testimony is not entirely clear or consistent, but we are satisfied that the declaration was made under a sense of impending

death, although we might reject the issue as a present subject of controversy, for the record will hardly bear out the assumption that any objection was made on the ground that no sufficient foundation for receiving the declaration had been laid.

We are also satisfied that it was proper rebuttal testimony. The witness did not undertake to detail the circumstances attending the altercation or the killing, nor did the state undertake to go further than to give the deceased's account of the conversation which led up to the fatal moment.

It is also assigned as error that the court did not charge the jury that it should receive the testimony which had been admitted as a dying declaration with caution. The court did not so instruct, neither was any instruction requested. It has been held to be error to refuse an instruction when such an instruction is requested, but this court is committed to the view that a case will not be reversed for mere nondirection of a jury except in those cases where the duty of the court to instruct is made mandatory by statute. *Lipsett v. Dettering,* 94 Wash. 629, 162 Pac. 1007; *State v. Hanes,* 84 Wash. 601, 147 Pac. 193. We have even gone so far as to hold that a failure to instruct as to the presumption of innocence is not error where no request was made. *State v. Ross,* 85 Wash. 218, 147 Pac. 1149.

State v. Eddon, 8 Wash. 292, 36 Pac. 139, and *State v. Mayo,* 42 Wash. 540, 85 Pac. 251, are relied on. It was held in these cases that an instruction to the effect that a dying declaration was to be treated as other evidence in the case was "too broad and liable to work injustice to the defendant." It will be observed that the court was guilty of a voluntary misdirection. Where the court assumes to instruct and instructs

wrongfully, an exception will save the right of the party litigant to have the matter reviewed in this court. There is, and must be of necessity, a wide distinction between misdirection and nondirection of a jury. In the one case, the trial judge, whose duty it is to declare the law, has actively assumed to perform that duty. If, in the exercise of it, he trenches upon the legal right of a party, an appellate court will correct the wrong. But where the trial judge overlooks the law, a party should not be allowed to take advantage of the error, for, as we said in the case of *State v. Ross, supra,* counsel owes some duty to the court to suggest the error so that it can be cured before the jury receives the case.

Another instruction is complained of. It is argumentative and not to be commended as a model, but it was passed as sufficient in the case of *State v. Wappenstein,* 67 Wash. 502, 121 Pac. 989.

We find no error, and the case is affirmed.

MAIN, C. J., MACKINTOSH, MITCHELL, and TOLMAN, JJ., concur.

[No. 14800. Department One. December 28, 1918.]

LOWRY ARMSTRONG *et al., Respondents,* v. MARY BURKETT, *Appellant.*[1]

LANDLORD AND TENANT (42)—ORAL LEASE—MONTH TO MONTH—STATUTE. Rem. Code, § 8802, providing that leases may be in writing or print and shall be valid for any term not exceeding one year without acknowledgment, witnesses, or seal, has no application to an oral lease, which can be sustained only as a lease from month to month.

SAME (42)—ORAL LEASE—ESTOPPEL. The mere possession, payment of rent, building up and conducting of a business in the usual way for the sole benefit of the tenant, does not make an oral lease good for a definite term, on the theory of estoppel, without some further benefit to the landlord or injustice to the tenant.

SAME (147)—FORCIBLE ENTRY AND DETAINER—DOUBLE DAMAGES. In an action for unlawful detainer by a tenant, Rem. Code, § 827, authorizes judgment for double the amount of rent accrued; notwithstanding the defendant tendered and paid into court the amount due up to the time of trial, contesting only the landlord's right to reenter.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered December 10, 1917, upon findings in favor of the plaintiffs, upon discharging the jury, in an action of forcible entry and detainer. Affirmed.

George L. Spirk, for appellant.

T. W. Bassett and *Tucker & Hyland* (*S. H. Steele,* of counsel), for respondents.

CHADWICK, J.—Plaintiffs brought this action in forcible entry and detainer. Defendant answered, setting up that she had leased from the then owner of the premises, a storeroom in the building now owned and occupied by the plaintiffs, for the term from April 15, 1916, to October 15, 1916, at $20 per month, with option to

[1]Reported in 177 Pac. 333.

extend the lease for a further period of six months, or until April 15, 1917. Upon the expiration of the written lease, the owners gave her until May 1, 1917, to decide whether she would continue in the occupation of the premises for a term ending April 15, 1918. She alleges that she paid the rental for the half month between April 15, 1917, and May 1, 1917, and that plaintiff leased the premises to her for the eleven and one-half months ending April 15, 1918. Rent was paid on May 15. On June 2d, plaintiffs served notice on defendant that her tenancy would terminate on August 15, 1917, with a demand that she surrender possession on or before that day. Defendant paid her rent up to August 15, but refused to vacate, whereupon plaintiffs brought this action.

The case came on for trial before a jury. After opening statements had been made, both by counsel for plaintiffs and for defendant, counsel for plaintiffs moved that the court direct a verdict upon the ground that no legal defense to the action had been set up in the affirmative answer, and upon the further ground that the statement of counsel, if sustained by evidence, would not constitute a defense to the action. Counsel for defendant, after some parley with the court, also moved for a judgment. We are following the history of the trial as recited in the briefs, for we find no statement of facts or bill of exceptions. The court thereupon dismissed the jury, and found the amount of the rent then accrued to be $80, which was doubled under the penal provisions of the statute, Rem. Code, § 827, and a judgment entered for the sum of $160.

Counsel advances the theory that the lease being for eleven and one-half months—being less than one year—is a valid lease although not in writing. The statute provides that "leases may be in writing or print, or

partly in writing and partly in print, and shall be legal and valid for any term or period not exceeding one year, without acknowledgment, witnesses, or seals." Rem. Code, § 8802. This statute goes no further than to sustain written or printed leases for whatever term provided, or for a term of one year when lacking the formalities demanded of all instruments evidencing an incumbrance upon real estate. Rem. Code, § 8745.

The court properly held that an oral lease for any term can only be sustained as a lease from month to month. *Mades v. Howaldt,* 46 Wash. 450, 90 Pac. 588; *Richards v. Redelsheimer,* 36 Wash. 325, 78 Pac. 934; *Spreitzer v. Miller,* 98 Wash. 601, 168 Pac. 179.

Defendant seeks to avoid the rule by setting up facts which are relied upon to create an estoppel; that, relying upon her contract, she made certain expenditures about the storeroom in the way of shelving, wall cabinets, and in changing the front of the store; that she had built up a business of some proportion; that she was wholly dependent upon the business for her support; that she could not get another location, and that she had ordered goods for the Christmas trade.

But manifestly these things are not matters of estoppel. The things done were all for the benefit of the lessee and were in no sense a consideration going to the entire term. The purchase of goods and the building up of a business, as well as the purchase of seasonable goods, were all incident to the contract. Defendant is charged with the knowledge that her lease was oral and subject to forfeiture from month to month and that she might have provided against such consequence by insisting upon a sufficient contract.

If one who enters into possession of business property can keep possession indefinitely by fitting the premises to the uses and convenience of his particular business, by paying his rent, and by the purchase of goods to meet anticipated trade, possession once obtained would be better than any written lease, for the lessee could continue possession at his own will at the rent first stipulated, and unhampered by the usual covenants and conditions of a written lease.

To make an oral lease good for one year under the theory of estoppel there must be some element of benefit to the landlord aside from the rent reserved, or some injustice to the tenant that a court of equity will not tolerate, as, for instance, where the landlord has made the lease conditioned upon some alteration or improvement that would enhance the value of the property, or where the value of the property lies in the taking of an annual crop. In other words, the mere possession, the payment of rent and the conduct of a business in the usual way and for the sole benefit of the tenant, unaccompanied by circumstances which will create a consideration going to the term, will not make an oral lease from month to month a term lease resting in estoppel. *Matzger v. Arcade Building & Realty Co.*, 80 Wash. 401, 141 Pac. 900, L. R. A. 1915A 288, and the cases cited therein will illustrate and sustain our thought.

Counsel bitterly complains that, having tendered and paid into court the rent from August 15 up to the time of the trial, being for the intervening time, the court should not visit the penalty of the statute upon his client. Our heart is with him and with his client, but the statute, Rem. Code, § 827, must guide our hand. It leaves no legitimate ground for the exercise of our sympathy. The trial judge had no discretion, nor have we. *Newman v. Worthen*, 57 Wash. 467, 107 Pac.

188; *Bond v. Chapman*, 34 Wash. 606, 76 Pac. 97; *O'Connell v. Arai*, 63 Wash. 280, 115 Pac. 95; *Shannon v. Loeb*, 65 Wash. 640, 118 Pac. 823.

It is no answer to say that plaintiffs might have withdrawn the money as it was paid in. A suit pending, it is likely that an acceptance of the amount tendered would have satisfied counsel's theory, a hazard plaintiffs were not called upon to take. It was their privilege to fix the legal rights of the parties as of the day of forfeiture.

Affirmed.

MAIN, C. J., MACKINTOSH, MITCHELL, and TOLMAN, JJ., concur.

ON PETITION FOR REHEARING.

[Department One. May 9, 1919.]

PER CURIAM.—In the body of our opinion in this case, we say:

"We are following the history of the trial as recited in the briefs, for we find no statement of facts or bill of exceptions."

Our attention is called to the fact that a statement of facts was on file and a part of the record at the time the opinion was written and for that and other reasons a rehearing should be granted.

We find that counsel is correct in his statement, although by some misprision the statement was not in the files when handed to the writer of the opinion. But appellant lost nothing on that account. We took her case from the brief of her counsel and made ruling of the law upon the facts as we there found them. Our ruling would have been the same whether we based it upon the statement of facts or upon the conclusions of counsel, which we accepted without question.

The petition for rehearing is denied.

[No. 14868. Department One. December 28, 1918.]

FLOYD J. LYONS, *Respondent*, v. SHERIDAN T. McELROY, *Appellant*, SARAH McELROY *et al.*, *Defendants*, RUTH G. FARMER, *as Guardian etc.*, *Intervener*.[1]

GUARDIAN AND WARD—TERMINATION OF RELATION—EFFECT OF MAJORITY. An order, entered without notice, authorizing a guardian to compromise a suit instituted by the ward after he became of age, is void, under Rem. Code, §§ 1631 and 1636, providing that the trust expires when the ward becomes twenty-one and making it the guardian's duty to then account for all the estate remaining in his hands.

WORK AND LABOR (18) — TRIAL — INSTRUCTION — IMPLIED AGREEMENT. In an action by a nephew to recover for services while a member of his uncle's family, it is proper to instruct that an agreement to pay for the services need not be in any form of writing or oral statement but may be implied from the conduct of the parties and that it is for the jury to determine whether the evidence shows an understanding that plaintiff would be paid.

Appeal from a judgment of the superior court for King county, Hall, J., entered February 20, 1917, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Charles E. Patterson, James M. Gephart, and *Tom S. Patterson,* for appellant.

Edwin D. Colvin and *James W. Bryan,* for respondent.

MITCHELL, J.—Respondent became twenty-one years of age on June 7, 1916. Between April 6, 1914, and October 22, 1915, he performed labor for appellant and associates in business. On November 15, 1916, he instituted this action to recover for five hundred and seven days' labor at the alleged reasonable value of $4 per day, admitting he had been paid $100 on the ac-

[1]Reported in 177 Pac. 312.

count. By reason of the failure to serve process, or an order of dismissal as to others, the cause was tried with appellant Sheridan T. McElroy as sole defendant. Appellant, in his answer, admitted payment of $100 and denied liability. He alleged affirmatively that respondent is a nephew toward whom he stood as a parent, and that the services of respondent were rendered gratuitously as a member of the family. A reply denied the affirmative matter except the relationship.

On February 17, 1914, respondent's aunt, a sister of appellant, by appointment of the superior court of King county, qualified as general guardian of the respondent. After the commencement of the present suit, and therefore after respondent was twenty-one years of age, the guardian, by a petition filed in the guardianship cause, asked authority to compromise this claim of respondent against appellant for which suit was pending. Neither the petition nor a citation on it was served on respondent, who it appears was then absent from the state; nevertheless, the department of the superior court hearing the petition entered an order authorizing and directing the guardian to compromise and settle the claim for $500. Thereupon appellant paid the guardian $500, and upon report thereof and the application of the guardian, who had been allowed to intervene herein against the interests of respondent, an order was made by one of the judges of the superior court, purporting to dismiss plaintiff's suit "so far as the rights of the guardian are concerned." Upon payment of the $500 to the guardian, the appellant filed a supplemental answer and affirmative defense in this cause, setting up the probate proceedings purporting to authorize the compromise and that he had complied by paying $500 to the guardian.

At the trial to a jury, in addition to testimony gen-

erally, the court, over the objections of respondent, admitted proof of the guardianship proceedings, including the payment of $500 by appellant to the guardian. At the close of all the testimony, appellant and the intervener each moved for a directed verdict generally, and especially because of the payment of $500 by appellant to the guardian. These motions were denied, and in addition, the court decided to submit the cause to the jury only upon the complaint and that portion of the answer containing denials and the affirmative defense that respondent's services were given as a member of the family. The jury returned a verdict for $1,155.50. Appellant filed motions for judgment notwithstanding the verdict and for a new trial, both of which were denied, and he appeals from the judgment on the verdict.

There are six assignments of error, as follows: (1) refusal of the court to direct a verdict for defendant by reason of the compromise and payment to the guardian; (2) instructing the jury to ignore all claims and proof of such compromise and settlement; (3) denying the motion of defendant for a judgment notwithstanding the verdict; (4) denying defendant's motion for a new trial on account of the compromise in the guardianship cause; (5) instructing the jury not to consider any of defendant's affirmative pleadings other than the averment that the services were rendered gratuitously; and (6) an alleged improper instruction to the jury.

Undisputed evidence shows respondent was over twenty-one years of age when he commenced this action. His former guardian had done nothing whatever to collect this claim. Indeed, it appears she was wholly unaware of the industry and activity of her former ward for nearly two years and until some time after her brother had been sued. Sections 1631

and 1636, Rem. Code, provide that the guardian of a minor shall have the care and management of his estate until he shall have attained the age of twenty-one years, at which time the trust expires, whereupon it shall be the duty of the guardian "fully to account for and pay over to the proper person all the estate of said ward *remaining in his hands.*" It is difficult to perceive how the former ward's claim for labor performed, involved in this suit, could have been considered as estate remaining in the hands of the guardian at the date the ward attained the age of majority, since there is no proof that she even knew of the existence of any such claim or right at that date. The action of the probate department of the court in purporting to take cognizance of this new matter, in the absence of the former minor's consent, after he was twenty-one years of age, and enter an order authorizing the former guardian to compromise the claim, was void. The jury was properly so advised.

The instruction complained of was this:

"An agreement to pay for services performed need not be in any form of writing or oral statement, but may be implied from the conduct of the parties. You are the judges as to whether the evidence shows there was an understanding that plaintiff would be paid for his services."

The instruction was correct. *Hodge v. Hodge,* 47 Wash. 196, 91 Pac. 764, 11 L. R. A. (N. S.) 873. It is further contended that this instruction conflicts with others given, but upon examination we find to the contrary.

There was sufficient evidence to justify the verdict. The judgment is affirmed.

MAIN, C. J., MACKINTOSH, TOLMAN, and CHADWICK, JJ., concur.

[No. 14884. Department One. December 28, 1918.]

E. C. HART *et al.*, *Appellants*, v. KING COUNTY, *Respondent*, PUGET SOUND TRACTION, LIGHT & POWER COMPANY, *Defendant*.[1]

CARRIERS (82)—ACTIONS FOR INJURIES—PLEADING. In a complaint for personal injuries through stepping into a hole in a county ferry approach, an allegation that the accident occurred "while alighting from a street car," was used in a general sense and as qualified by other references, when construed together with the allegation that it was "while attempting to walk" upon the approach to the ferry, and "in the direct pathway thereof," and allegations fixing the exact location of the hole in the walk.

SAME (81)—COMPANIES LIABLE — JOINT LIABILITY — COMMON APPROACH. In an action for personal injuries "while alighting from a street car," stepping into a hole in a plank roadway maintained at the terminus of the street car tracks by two carriers jointly, both would be liable, where the accident was not due to any movement of the street car.

COUNTIES (56)—TORTS—LIABILITY—OPERATION OF FERRY. A county operating a ferry for hire under the authority of Rem. Code, § 5013, acts in its proprietary capacity, and is liable in damages for its acts and omissions as an individual engaged in a like enterprise.

CARRIERS (81)—COMPANIES LIABLE — JOINT LIABILITY — COMMON APPROACH. Where two common carriers, each acting independently in the collection of fares, maintain an approach or connecting way for the convenience of passengers in transferring, the duty of maintenance is upon both, and liability to passengers cannot be evaded by either by contract between themselves, or by a denial of ownership in the fee to the approach.

CARRIERS (82) — ACTION FOR INJURIES — PLEADING. In an action against a carrier by an intending passenger injured upon an approach, an allegation overstating the degree of care required does not render the complaint subject to general demurrer.

SAME (70, 75)—CARE REQUIRED—INTENDING PASSENGERS. A carrier is only bound to exercise ordinary care as to an intending passenger using an approach to a ferry.

SAME (88)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY. Where an intending passenger, in the nighttime, stepped into a hole in a county ferry approach that was not lighted so that the hole could

[1]Reported in 177 Pac. 344.

be seen, whether the county exercised reasonable care for the safety of passengers is a question for the jury.

COUNTIES (37) — CONTRACTS AND LIABILITY — MAINTENANCE OF FERRY—ULTRA VIRES. A county, being authorized by Rem. Code, § 5013, to conduct a ferry and collect tolls, the maintenance of approaches and landing places is not *ultra vires*, but is necessarily implied as part of the general power granted.

SAME (100)—ACTIONS—PLEADING—NOTICE OF CLAIM. In a complaint against a county repeatedly referring to an accident on a county ferry approach in November, 1916, a charge that the county had notice of the defect long before November 30, 1917, is clearly a clerical error, and sufficiently pleads notice, as against a general demurrer.

PLEADING (6)—CONCLUSIONS—"NEGLIGENT." A complaint against a carrier by a passenger for personal injuries, is sufficient where it sets out the facts and breach of legal duty, although it fails to use the term negligent, or allege that a defect was dangerous.

Appeal from a judgment of the superior court for King county, Frater, J., entered February 25, 1918, upon sustaining a demurrer to the complaint, dismissing an action for personal injuries sustained by a passenger through a defective approach to a ferry landing. Reversed.

Farrell, Kane & Stratton and *Wm. M. Watson*, for appellants.

Alfred H. Lundin, S. M. Brackett, and *Wm. J. Steinert*, for respondent.

CHADWICK, J.—Appellants brought this action to recover for an injury suffered by the plaintiff wife while traveling from the downtown district in Seattle to Kirkland, on the east shore of Lake Washington. The route of travel was over the Madison street car line of the Puget Sound Traction, Light & Power Company, and the ferry maintained by respondent King county between the western shore of Lake Washington at the end of Madison street and the

eastern shore of the lake. The plaintiff husband being joined to satisfy the statute, we shall refer to the plaintiff wife as the plaintiff.

The appeal is from a judgment of dismissal as to King county, after the court had sustained a general demurrer to the second amended complaint. The traction company is not a party to this appeal. The demurrer admits that the county of King is maintaining, under the authority of existing statutes, a ferry for hire, with approaches for the use of intending passengers; that the traction company's street car line ends at about the east side of Laurelshade avenue, a street or boulevard skirting the western shores of Lake Washington; that the traction company and the respondent maintain a plank roadway or approach from the terminus of the street railway to the landing slip of the ferry.

It is fairly stated in the complaint that the approach or roadway was a link in the method provided by the two defendants for the continuous movement of passengers from the city to the ferry. It is also alleged that, although the approach was built upon property owned by the traction company, the respondent and the traction company had entered into a contract whereby King county had assumed the duty of keeping the plank road or approach in repair.

We take it from the briefs that the court was of the opinion that the county would not be liable because the title to the property over which the roadway had been laid was in the traction company; and, furthermore, that the complaint did not sufficiently charge that the injury complained of occurred at a time when any duty, under any theory of the law, would attach to respondent.

The allegations of the complaint going to the injury are as follows:

". . . and [the approach] was then and had long been used in common by the said two defendants aforesaid for the travel of the invited and intending passengers of each of said defendants going and coming and returning to and from the said street cars and the wharf and ferry boats of said two defendants respectively; and the plaintiff Hazel Hart, while such passenger of said defendant Puget Sound Traction, Light & Power Company, and while alighting from said street car, and while in the attempting to walk upon the said regularly used plankway or approach to said ferry, and while in the direct pathway thereof, leading straight to said ticket office of said ferry from said street car terminus, in walking towards said wharf with the intent and for the purpose of taking passage on the ferry boat of King county, which was scheduled to leave at ten o'clock p. m. for Kirkland, stepped into a hole in said plankway, which hole was about thirteen inches long and four and one-half inches wide and was about thirteen inches southward from the easterly end of the southerly rail of the said street car track, and about six or seven feet easterly from the east side of Laurelshade avenue produced across the eastern end of Madison street, and instantly fell upon said plankway while her foot was thus in said hole to the extent of thirteen inches in depth, which said stepping and falling caused said plaintiff the severe and serious injuries hereinafter detailed. That said fall occurred at about nine fifty-five o'clock on the night of said 30th day of November, 1916, and while there was not sufficient light of any kind whereby said plaintiff might or could see said hole in said plankway, and said plaintiff had never seen said hole nor had she been told of it nor warned about it by any one, and never knew or heard of its existence before said fall."

Counsel for respondent rests his main argument upon that part of the complaint which says "and while

alighting from said street car." The law requires us to construe complaints liberally as against a general demurrer, and when so considered we think, in the absence of a motion to make the complaint more definite and certain, there is a fair charge of liability. The words "and while in the attempting to walk upon the said regularly used plankway or approach to said ferry, and while in the direct pathway thereof, leading straight to said ticket office of said ferry and from said street car terminus, in walking towards said wharf with the intent and for the purpose of taking passage on the ferry boat of King county . . . stepped into a hole in said plankway, which hole was . . . about six or seven feet easterly from the east side of Laurelshade avenue produced across the eastern end of Madison street," and that part of paragraph 6 of the complaint wherein it is alleged that the plank approaches to the ferry extend from Laurelshade avenue east to the King county wharf and ferry, must be given their legal weight and inferences. When the whole complaint is construed together, it would seem that the words "alighting from said street car" were used in a general sense and, as qualified by other references, are sufficient to charge that it was while going from the street car to the ferry that plaintiff fell and injured herself.

But if this construction be not sound—if, as it is alleged, the roadway or approach between the terminus of the one common carrier and the other was maintained jointly and as an aid to traffic and intending passengers, the county's liability would begin when the plaintiff stepped onto the plank roadway, although she may have been in the act of alighting from the street car; for it will be borne in mind that there is no charge that she was injured by any move-

ment of the street car. The thing relied upon is the defect in the approach, and that alone.

By availing itself of the privileges offered under Rem. Code, § 5013, the county made of itself a common carrier for hire. It is operating in its proprietary capacity (*Anderson Steamboat Co. v. King County,* 84 Wash. 375, 146 Pac. 855), and as such proprietor is liable to answer in damages for its acts or omissions, as would an individual or a *quasi* public corporation engaged in a like enterprise for hire. *Bergen v. Lewis County,* 95 Wash. 499, 164 Pac. 73.

Many cases are cited by counsel on either side going to the law of "intending passengers." None of them covers a case like this where two common carriers, each acting independently in the collection of fares, maintain an approach, or connecting way, in common for mutual benefit and for the convenience of passengers who are compelled to transfer from one carrier to the other. The duty of maintenance, by whatever method that duty is divided between themselves, being upon both carriers, it would seem that an injury sustained while transferring would make both carriers answerable for neglect of the mutual duty. For in such cases the duty of protection to passengers is, as between the carriers, neither individual nor delegable, nor can it be evaded by contract *inter sese,* or by a denial of an ownership of the fee.

Respondent complains that the pleading holds it to a greater degree of care than the law will warrant; that it is not held, as the complainant says, to a high degree of care, but to an ordinary and reasonable degree of care, citing *Belles v. Tacoma,* 79 Wash. 200, 140 Pac. 324, and *Wilton v. Spokane,* 73 Wash. 619, 132 Pac. 404, L. R. A. 1917D 234. But this would not make the complaint vulnerable to an attack by a

general demurrer. The charge of "a high degree of care," if material at all, and we do question its materiality, is an overstatement of the law, rather than an understatement of fact, and is subject to correction by the court at the trial.

It seems to have been settled that there is a difference in the degree of care imposed upon a common carrier as between the case of one who is actually a passenger and one who is intending to take passage and is approaching in the manner and by the means provided by the carrier. In the latter event, the carrier is held to the rule of ordinary or reasonable care.

"They are only bound to exercise ordinary care in view of the dangers to be apprehended. The distinction between such liability for an injury to a passenger occurring on their cars or boats, and for an injury occurring on their platforms or approaches to the station or landing places, is well recognized." *Skottowe v. Oregon Short Line & U. N. R. Co.*, 22 Ore. 430, 30 Pac. 222, 16 L. R. A. 593; and in principle, *Gregg v. King County*, 80 Wash. 196, 141 Pac. 340, Ann. Cas. 1916C 135.

Whether respondent exercised reasonable care for the safety of passengers approaching the ferry is a question of fact for the jury. *Harris v. Bremerton*, 85 Wash. 64, 147 Pac. 638, Ann. Cas. 1916C 160.

Counsel contends that, in any event, respondent county is not liable because the maintenance of an approach to a ferry is *ultra vires*, in that the county is only empowered to build wharves and landings at the termination of a county road (Rem. Code, § 8114); that Madison street, being within the corporate limits of a city, is not a county road, and therefore the maintenance of the approach is beyond the power of the county and there is no liability.

In an action against a municipal corporation for a

tort, the first inquiry, as against a plea of *ultra vires,* is whether the act complained of necessarily lies wholly outside of the general or special powers of the municipality, for a municipal corporation has all powers necessarily incident to the execution of its granted powers. So in this case, the county being empowered to conduct a ferry and collect tolls (Rem. Code, § 5013), authority to provide approaches is necessarily implied as a part of its general power, for without approaches and landing places it could not exercise the major function.

It is insisted, also, that the complaint does not sufficiently charge that appellant had notice of the defect. It is said in the brief,

"The accident occurred in November, 1916. The allegation is that the respondent knew, or should have known, the existence of said hole on and long before November 30, 1917, which was a year after the accident. This certainly is not sufficient."

We cannot believe that counsel seriously believe that we should sustain the judgment because notice was insufficiently plead. "The 30th day of November, 1916," is written in the complaint nine times, and twice in the same paragraph in which the charge of notice is fixed as of a time "long before November 30, 1917." It would have been proper, if the patent clerical error was of sufficient importance to invite consideration, to have moved to make the complaint more definite and certain.

It is also urged that negligence is not sufficiently plead, in that the term "negligent" nowhere appears in the entire pleading, and furthermore, that "it is not alleged that the hole was dangerous." It might have been proper, as it is usual to adorn complaints in cases of this kind with word and phrase, to have

so alleged. But the use of the word "negligent," or a statement that the hole in which respondent stepped was dangerous, would have added nothing to the legal sufficiency of the complaint. It was enough to allege the breach of a legal duty. The conclusion of the pleader, with which the jury may entirely disagree, adds nothing to a complaint, which, under our statute, ought to be, and sometimes is, "a plain and concise statement of facts constituting the cause of action."

Reversed, and remanded with instructions to overrule the demurrer.

MAIN, C. J., MACKINTOSH, MITCHELL, and TOLMAN, JJ., concur.

[No. 14887. Department One. December 28, 1918.]

DRAINAGE DISTRICT NO. 3 OF KING COUNTY *et al.*, *Respondents*, v. MACHIAS MILL COMPANY, *Appellant*.[1]

LOGS AND LOGGING (5)—DRIVING AND FLOATING LOGS—RIGHT TO USE STREAM—EFFECT ON DRAINAGE. Where a stream, which has been improved by a drainage district, had been capable, during the annual periods of high water, of being profitably used for floating logs and timber products to market, the drainage commissioners are not entitled to an injunction against the use of the stream and banks for continuous floatage of logs by natural methods, even if objectionable to riparian rights; but only to relief against such holding, storing and accumulation of logs and timber products as will interfere with the fitness of the stream for drainage purposes by the silting of the channel and causing bars not due to natural conditions.

Appeal from a judgment of the superior court for King county, Jurey, J., entered November 14, 1917, in favor of the plaintiffs, in an action for an injunction, tried to the court. Modified.

[1]Reported in 177 Pac. 326.

Weter & Roberts, for appellant.

Shorett, McLaren & Shorett, for respondents.

MACKINTOSH, J.—The plaintiffs, as drainage district commissioners, seek to enjoin the defendant from the use of a drainage channel in connection with its logging operations in such way as to interfere with the channel as a drainage way.

The Sammamish river flows from Lake Sammamish to Lake Washington, and in its natural channel was a long, tortuous, sluggish stream which was used to some extent in early days by small boats and for the driving of logs. The river in its natural course, not furnishing sufficient drainage for the surrounding lands, was straightened and deepened under authority by drainage district No. 3, created for that purpose.

The drainage channel suffers from accumulations of silt into bars. The plaintiffs claim that these accumulations are accelerated in the summer time by jams of defendant's logs created when the water is low, which lessens the capacity of the channel in the winter when its entire capacity is necessary to drain the territory it was created to serve.

The trial court made this decree:

"Ordered, adjudged and decreed that the defendant, and each of its servants, agents, employees and officers be, and they are hereby restrained and enjoined from in any manner using the bed, channel or banks of the drainage system of said district as a place of storing, holding, retaining, or accumulating saw logs or other timber products, or from in any manner using any part of said drainage channel as a reservoir or a place of holding, storing, retaining, or accumulating logs or other timber products, or from in any manner holding, storing, or accumulating logs or other timber products in said channel in such a

manner as to back or raise the waters in said channel so as to interfere with its fitness as a drainage channel for the lands included in said drainage district.

"It is further ordered, adjudged and decreed that the defendant and each of its officers, agents, servants or employees be, and they are hereby enjoined from going upon the banks of said drainage channel in connection with any of its logging operations, and enjoined from attaching or fastening logs to said banks or bed of said channel for the purpose of forming what are called wing dams, or other artificial aids, so as to enable the same to be used by the defendant as a means of transporting such timber products.

"It is further ordered, adjudged and decreed that the defendant be, and is hereby ordered and required to remove from said drainage channel all logs or other artificial aids which it may have attached to the banks of said drainage channel or which may be attached to the banks or beds, and any and all logs now along or being thereon or therein; and that said removal be had forthwith, except, however, that as to certain large logs which are attached to the banks of said channel the defendant be, and it is hereby given up to and including January 1, 1918, for the removal of any such large logs, which, on account of their size, cannot be practically removed down stream earlier than December 1st.

"It is further ordered, adjudged and decreed that this decree shall not be taken or construed to prevent the defendant from using said channel for the purpose of towing logs, in a reasonable manner, at such seasons as the depth of water in said channel may permit of such towing; nor shall this decree be construed to prevent defendant from driving logs down said channel, provided that the same is done at such seasons as the depth of water will permit to be done without the employment of any artificial aids or means of assistance; and provided further that the same said driving of logs must be done by keeping said logs continuously in motion and without permitting the same to become stranded or accumulated at any place along said channel, it being the intention hereof that the de-

fendant shall be permitted to use said stream for floating or towing logs only to the extent that the same can be carried on without the use of any artificial aids whatever."

The plaintiffs assert that "the case involves the old question of the relative rights of the logger and the riparian owners, plaintiffs, of course, representing the property and property owners who are included in and benefited by, and have had to pay for, the drainage improvement in question." As we view it, the controversy does not involve nearly as much as here asserted. By neither the authority vested in the plaintiffs nor by their complaint are they entitled to assert the rights of the riparian owners. Their only interest in the stream is as drainage commissioners who are protecting it from being used in such way as to lessen its usefulness as a drainage way. They have no interest in any interference that the defendant may be imposing upon the riparian owners, unless such interference results in the injury alleged in the complaint, which is that the defendant allows logs to collect in the channel in such way as to cause rapid accumulation of sediment, thus forming bars so as to destroy its usefulness. With this clearly in mind, it is apparent that the decree as entered is broader than justified by the plaintiffs' authority or by their complaint.

That the defendant had a right to the use of the channel for the driving of logs cannot be gainsaid—the stream in its natural course was navigable under the testimony as we read it and under the law.

In Farnham on Waters and Water Rights, at § 25:

"Water Capable of Floating Logs. Streams which are capable of floating to market the products of the soil along their banks are navigable within the rule subjecting navigable streams to public use. The pub-

lic have a right of way in every stream which is capable, in its natural state and its ordinary volume of water, of transporting in a condition fit for market the products of the forests or mines, or tillage of the soil upon its banks. It is not essential that the property to be transported shall be carried in vessels or be guided by the hand of man, if it can be safely carried without such guidance. Nor is it necessary that the stream shall be capable of navigation against its current. Nor shall it be navigable at all seasons of the year, it being sufficient that it become navigable periodically from natural causes. But in order to come within the rule the stream must be actually capable of some profitable use. The capacity as shown by the use to which it is put is the true criterion by which to judge the question of navigability. It is sufficient if it is capable of floating vessels, boats, or other craft, or rafts of logs, or logs in quantities to make it of commercial value. The fact that the logs must be floated without being formed into rafts is not sufficient to destroy its navigable character; but the width of the stream may diminish to such an extent that such a stream would be of no commercial value because of the cost in time and labor in getting quantities of logs through it and destroy its usefulness. Such streams are not subject to public use. If the stream is capable of floating to a profitable extent it is navigable, and a public highway. The stream must, however, be capable of such use in its natural state, for it is not subject to public use if improvement is necessary to fit it for such use. Most streams fluctuate in capacity, containing considerable water during the season of melting snow and frequent fall of rains, and in periods of droughts becoming in some instances almost dry. The fact that in the dry season the stream is not capable of use will not prevent its being used at other times when it is capable of it. But the period of capacity must be sufficiently regular and continued to make the stream of commercial importance. The stream may be used whenever its capacity is sufficient for that purpose. If the stream cannot be used without traveling along the banks to

aid the passage of the logs it is not a navigable stream. But if the general character of the stream is such that it will float logs without aid from the banks the mere fact that persons using it find it convenient to go upon the banks, and, in fact, do so, will not destroy the navigable character of the stream."

In *Monroe Mill Co. v. Menzel,* 35 Wash. 487, 77 Pac. 813, 102 Am. St. 905, 70 L. R. A. 272:

"The reasons leading to the holding in this state and others, where the timber industry is important, that streams which are navigable in fact for the floatage of timber to market shall be public highways for that purpose are founded upon commercial convenience and necessity because of the environment of the industry. Much of the timber grows in the mountains, also upon the foothills, and in other localities which are inaccessible by means of transportation facilities, without great expense. Nature has, however, provided numerous streams which flow out from these timber centers, and which are available highways for the carriage of the timber to market. In a locality so situated, it seems reasonable that these highways should be used for such purposes. It is true, the majority of these streams, being unmeandered, pass over private property, and their beds are owned by the adjacent landowner. But the lands are naturally burdened, if it be a burden, by the streams themselves, with their defined banks and flowing water, and it is not an additional burden to the landowner for the timber product to float along with the already running water, provided it is so done as not to damage his land. His rights in the latter particular must, however, be strictly and carefully guarded."

After improvement it was still navigable and could be used by the public as theretofore. In Gould on Waters (2d ed.), at §§ 110, 111:

"In streams which are only floatable, the riparian owner is only bound not to obstruct its reasonable use for that purpose. His obligation to supply reason-

able facilities for the passage of logs does not extend to the passage of rafts of considerable size. If he obstructs the stream by making a new channel into which its waters are turned, the public may use it for floating logs and rafts as they had been accustomed to use the old channel, the right of passage applying to the natural flow of the stream or its equivalent; and if the new channel becomes obstructed, they may effect a suitable passage over the former channel, causing no unnecessary damage thereby.

"If the natural navigation of the river affords a channel for useful commerce, it continues to be navigable and open to the public although the natural barriers which render its navigation difficult are afterwards removed by artificial means, such as locks, canals and dams. If the navigation of a river which was originally navigable in fact, to a greater or less extent, be improved by the act of the riparian owners in deepening the channel, the public have the right to use it for all purposes to which it is suited in its improved condition."

The only matter remaining for determination is whether, as a matter of fact, the defendant, in the use it is making of the channel, is interfering with the drainage, not whether the defendant may be interfering with the rights of some riparian owner by going upon the banks to break up jams or to attach wing dams, etc. The authorities cited by the plaintiffs, holding that the defendant would not be allowed to do these and similar acts might be instructive were this an action brought by a riparian owner to enjoin the invasion of his rights.

A painstaking review of the testimony and exhibits, a resume of which would needlessly expand this opinion, convinces us that the use being made of the channel by the defendant is not interfering with its value for drainage, but that the silting of the channel is a condition due to the natural perversity of the river

itself and its tributaries, accentuated perhaps by the alterations performed by the plaintiffs themselves.

The decree as entered will be modified by striking therefrom all of it except the following:

"Ordered, adjudged and decreed that the defendant, and each of its servants, agents, employees and officers be, and they are hereby restrained and enjoined from in any manner holding, storing, or accumulating logs or other timber products in said channel in such a manner as to back or raise the waters in said channel so as to interfere with its fitness as a drainage channel for the lands included in said drainage district.

"It is further ordered, adjudged and decreed that this decree shall not be taken or construed to prevent the defendant from using said channel for the purpose of towing logs, in a reasonable manner, at such seasons as the depth of water in said channel may permit of such towing; nor shall this decree be construed to prevent defendant from driving logs down said channel, provided that the same is done at such seasons as the depth of water will permit to be done; and provided further that the same said driving of logs must be done by keeping said logs continuously in motion and without permitting the same to become stranded or accumulated at any place along said channel."

MAIN, C. J., TOLMAN, CHADWICK, and MITCHELL, JJ., concur.

[No. 14926. Department One. December 28, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. PETER McGUFF, *Appellant*.[1]

FORGERY (4)—INFORMATION—DUPLICITY. An information for forgery is not duplicitous in charging the forgery of a check with intent to defraud and of knowingly uttering the check with intent to defraud, as parts of one connected act continuous in point of time.

SAME (4). An information charging that accused feloniously forged a check imports an intent to defraud.

CRIMINAL LAW (452)—APPEAL—HARMLESS ERROR—INSTRUCTIONS. An instruction as to forgery, putting a greater burden on the state than called for, is not prejudicial to defendant.

SAME (259-262)—TRIAL—INSTRUCTIONS—COMMENTS—ASSUMPTIONS. In a prosecution for forgery, an instruction to the jury, if they find that defendant passed the check with intent to defraud, will not be held as a comment upon or an assumption of the facts, where it could not have misled the jury, and the passing was not a matter in issue.

SAME (54)—FORMER JEOPARDY—IDENTITY OF OFFENSES — FORGERY OF DIFFERENT CHECKS—IDENTIFICATION BY WITNESS. In a prosecution for forgery and altering one of two identical checks passed by the accused on the same day, the fact that the prosecuting witness, when on the stand, could not identify and state on which check the prosecution was based, does not operate as denial of the right to plead former jeopardy, where the check in suit had identifying marks, and the prosecuting attorney stated that the prosecution was based upon it.

SAME (159)—EVIDENCE (218)—COMPARISON OF HANDWRITING. In a prosecution for forgery, a bank officer who had never seen the accused write or paid any of his checks, cannot give his opinion that the accused had written and signed the check, based upon a comparison of the handwriting with an unauthenticated bank identification card from the bank's filing system, containing the purported signature of the accused.

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered March 26, 1917, upon a trial and conviction of forgery. Reversed.

[1]Reported in 177 Pac. 316.

Snively & Bounds and *Charles F. Bolin,* for appellant.

O. R. Schumann and *J. Lenox Ward,* for respondent.

CHADWICK, J.—Appellant was put to trial upon a charge of forgery. The charging part of the information is as follows:

"That he, the said Peter McGuff, on the 13th day of December, 1916, did then and there feloniously forge a writing, on paper, the said writing on paper being then and there an instrument by which the title of personal property was evidenced, created, acknowledged and transferred, the same being a request for the payment of money of the tenor following:

" 'Counter Check.

"North Yakima, Wash., Dec. 13, 1916. No. ....

"The Yakima National Bank—Pay to the order of Peter McGuff $15.00.

"Fifteen .....dollars.

"To the Yakima National Bank 98-23,

"United States Depositary,

"North Yakima, Wash. A. Gordon.'

"And the said Peter McGuff did, then and there knowing said writing to be forged and fraudulent, utter the same as true to one John Diem, with the intent to defraud the said John Diem, the said A. Gordon, the said Yakima National Bank, and some other person or persons to the prosecuting attorney unknown."

I. The court instructed the jury that it should find appellant guilty if it found that he had forged the check with intent to defraud the prosecuting witness. It is complained that the information charged two crimes, that of forging and that of uttering, and that the information does not charge that the check was forged with intent to defraud.

The question of duplicity is met by *State v. McBride,* 72 Wash. 390, 130 Pac. 486, and will need no further discussion. The second objection is unavail-

ing, for the word "feloniously" imports an intent to defraud, or if it does not, the instruction puts a greater burden on the state than the information called for, and of this appellant cannot complain.

II. The court instructed the jury as follows:

"If you find from the evidence beyond a reasonable doubt all of the following alleged facts, viz., that in Yakima county, Washington, on or about the thirteenth day of December, 1916, the defendant, Peter McGuff, did utter and publish, that is, passed as true, 'Plaintiff's Exhibit A;' that said Exhibit 'A' was a request for the payment of money and that it was false and forged, that is, not signed by the person whose name it bears, nor with his authority, or consent, *and that the defendant at the time he passed the same knew it to be false or forged, and that in passing the same he intended to defraud John Diem,* mentioned in the information, you will find him guilty of the commission of the crime of forgery in the first degree, in the manner last charged in the information, that is, by uttering said Exhibit 'A.' "

The italicized part of the instruction is complained of as a comment on the evidence and as an assumption of fact which should have been left to the jury. We do not so read the instruction. While not punctuated in the usual way, the jury could not have misunderstood the spoken words of the court or have been led into the belief that they are to assume any of the matters referred to after the words "following alleged facts, viz.:" Furthermore, the passing of the check to the prosecuting witness was not made an issue, but was, on the contrary, testified to by one of appellant's witnesses.

III. Appellant gave two checks to the complaining witness on the same day, each for the same amount, or purporting to have been drawn by the same party upon the same bank. Each check was indorsed by

the appellant. One check was passed about 3 o'clock, and the other at about 5 o'clock. Each of these checks were introduced in evidence and marked, respectively, as "A" and "B." When on the stand the complaining witness could not tell upon which check the prosecution was relying to sustain the charge. Counsel maintain that the prosecution must therefore fail because of this uncertainty in the mind of the prosecuting witness, their contention being that, under the testimony, the jury may have convicted upon either the check "A" or the check "B," and if appellant were called upon to plead former jeopardy he would be met by an answer setting up the one or the other, at the will of the prosecuting attorney, and that this would operate in practice as a denial of the right to plead former jeopardy. But the prosecution does not have to depend upon the lay mind. It would not have been bound by the answer of the prosecuting witness, whatever his answer may have been. It is clear to us, as was stated by the prosecuting attorney at the trial, that the charge was founded upon Exhibit "A." It has certain distinguishing marks which are set out in the information. It follows that the appellant can claim no advantage because the prosecuting witness could not say which check had been described in the information.

IV. Mr. Chas. Heath, cashier of the bank upon which the checks were drawn, was called to identify the signature of the appellant. He had never seen appellant write his name, had never cashed a check for him, and had never examined an admitted or authenticated signature. The witness had brought with him from the bank a card taken from the card filing system of the bank containing the purported signature of Peter McGuff. Over objection, the witness was allowed to compare the signature upon the card with

the writing upon the check and to give his opinion that the appellant had written and signed the check, which is alleged to have been forged. Although the witness said that the tellers received all checks and paid out all moneys, and that no checks went through his hands, no officer or employee of the bank having any knowledge of the authenticity of the signature on the card was called as a witness. It has come to be a rule of quite universal application that an opinion as to handwriting may not be expressed where the opinion is based on a comparison, unless the standard of comparison is proven by direct and positive evidence. 3 Jones, Commentaries on Evidence, § 555; Chamberlayne, Modern Law of Evidence, §§ 2265-2268; 6 Ency. Evidence, 431.

Proof of handwriting by comparison was not tolerated at common law. While generally admitted in this generation under appropriate statutes or by judicial practice, no court, so far as we are advised, has ever admitted a standard of comparison except upon strict proof. It must be admitted or proved. *O'Brien v. McKelvey,* 59 Wash. 115, 109 Pac. 337; *State v. Cottrell,* 56 Wash. 543, 106 Pac. 179.

The prosecuting attorney undertakes to sustain the record upon the showing that the card was a part of the records of the bank, and that it is the custom of banks who have accounts to have their customers sign signature or identification cards. But this is not sufficient. Although it is a rule that a presumption of regularity attends things done in the regular course of business and according to the custom of trade, we know of no rule that would excuse the state, when engaged in the prosecution of a person charged with a crime, from the strict proof that is required in such cases. 6 Ency. Evidence, 432.

Counsel rely also on the rule that a knowledge of the handwriting of another may be shown by one who is familiar with it in the usual and ordinary course of trade or business or social relationships. This is settled in this state. *Poncin v. Furth,* 15 Wash. 201, 46 Pac. 241.

It is on this ground that clerks, cashiers, or other officers of banks at which a party has been accustomed to do business may be competent to prove his handwriting, although they have never seen him write. But the state has not brought its witness within any of these rules. Mr. Heath says that he never saw McGuff write his signature, and that he has never received or paid any of his checks. If Mr. Heath had testified as one having actual knowledge, or that he had received checks from time to time in the same handwriting and had paid out money thereon, that the signature had never been questioned or challenged, or that he had entered checks in the same handwriting in the books from time to time, and that the relations of the bank and its depositor had continued without challenge or interruption, he would have been a competent witness to testify to the genuineness of the signature. But the state contented itself with an identification by comparison, and the witness neither qualified himself as an expert nor as competent to establish the standard of comparison. So far as the record in this case goes, the cashier of the bank was as much a stranger to the transaction and to the handwriting of the appellant as any witness called to express an opinion upon the handwriting on the checks would have been.

V. Appellant contends that the testimony was insufficient to sustain the verdict. We have read the record and are quite convinced that the court com-

mitted no error in overruling a motion for a new trial upon that ground. It is true that appellant made out a case that would make it seem unlikely that he would commit the crime, but the credibility of his witnesses was for the jury.

Reversed and remanded for a new trial.

MAIN, C. J., MITCHELL, TOLMAN, and MACKINTOSH, JJ., concur.

[No. 14939. Department One. December 28, 1918.]

G. E. PETERSON *et al., Respondents,* v. J. C. C. MORRIS *et al., Appellants.*[1]

PARTNERSHIP (55)—ACTIONS—CAPACITY TO SUE—CERTIFICATE OF ASSUMED NAME—RAISING ISSUE—STATUTES. Where, upon demurrer to a complaint by a copartnership which failed to allege the filing of a certificate of assumed name in the county where it did or intended to do business, an amended complaint was filed alleging the filing of the certificate in K. county and issue was joined by general denial, the capacity of the plaintiff to sue was sufficiently raised; and under Rem. Code, §§ 8369-8373, requiring plaintiff to allege and prove capacity, there was a complete failure of proof, where it appeared that plaintiff was organized to do business in P. county, and had no business and had never done any in K. county.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 10, 1918, upon findings in favor of the plaintiffs, in an action for damages and for money received, tried to the court. Reversed.

Weter & Roberts, for appellants.

James H. Kane, E. N. Eisenhower, and *Bates & Peterson,* for respondents.

CHADWICK, J.—Respondents brought this action to recover damages and for money had and received.

[1]Reported in 177 Pac. 320.

Respondents are partners doing business at Tacoma, in Pierce county, under the name and style of the Moon Motor Sales Company.

It was alleged in the complaint that "at all times herein mentioned, G. E. Peterson and John J. Malim were doing business under the firm name and style of Moon Motor Sales Company, and were the sole owners of the business."

Appellants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. So far as the record goes, it seems that both sides assumed that the demurrer raised the question of the capacity of the plaintiffs to maintain the action under the provisions of our statute, which provides that all persons doing business as a partnership under an assumed name shall file a certificate, setting forth the real names of the parties interested in the partnership, in the county in which they are conducting, or intending to conduct, their business, and that no person or persons carrying on, or conducting, or transacting, business as a partnership under an assumed name shall be entitled to maintain any suit in any of the courts of this state without alleging and proving that such person or persons have filed the necessary certificate. Rem. Code, §§ 8369-8373.

Respondents thereupon took leave to amend their complaint by adding the words "and have heretofore filed with the county clerk of King county their business certificate showing their ownership of such business."

Appellants made answer as follows:

"In answer to paragraph 1, defendants deny each and every allegation therein contained, except only as to any allegations therein which may be admitted

in the affirmative answer to plaintiffs' first cause of action."

This being the state of the pleadings, appellants contended at the trial that the respondents were not entitled to maintain the action, it having developed that the partnership was organized to do business in Pierce county and that it had no business, and had never done any business, in King county. The trial judge overruled the motion of appellants to dismiss, upon the theory, as we may assume from respondent's brief, that the objection had not been taken by demurrer or answer. The complaint, as amended, was not demurrable. It was in form sufficient to stand as against either a general demurrer or a demurrer on the ground that plaintiff had no legal capacity to sue.

The further theory is advanced that the denial is in form no more than a general denial, and the matter relied upon, being in bar or abatement of the action, cannot be urged under that form of denial. We have held, under the statute cited above, and the statute providing for the filing of a certificate by a corporation plaintiff that its annual dues had been paid, that the objection will be waived if it is not raised by demurrer or by answer. *Rothchild Bros. v. Mahoney,* 51 Wash. 633, 99 Pac. 1031; *Pierson v. Northern Pac. R. Co.,* 61 Wash. 450, 112 Pac. 509; *Hale v. City Cab, Carriage & Transfer Co.,* 66 Wash. 459, 119 Pac. 837; *North Star Trading Co. v. Alaska-Yukon-Pacific Exposition,* 68 Wash. 457, 123 Pac. 605; *Boston Tow Boat Co. v. Sesnon Co.,* 64 Wash. 375, 116 Pac. 1083.

But it seems to us that this case presents more than a question of pleading. Under the statute it is provided that no partnership doing business under an assumed name shall maintain an action without alleging *and proving* that it has complied with the law. Hav-

ing tendered the issue, it was incumbent upon the plaintiff to sustain all of the material facts upon which it relied for a recovery. The proof entirely failed. It was suggested at the trial that a certificate had been filed in King county, but it was not offered in evidence, nor would it have availed respondent anything if it had been so offered. The court has heretofore committed itself to the form of pleading employed in the answer.

It was held in *Denver v. Spokane Falls,* 7 Wash. 226, 34 Pac. 926, that the legal capacity of a plaintiff might be raised under this form of a denial, and under a like denial the plaintiff was put to its proof as to every allegation material to its cause of action.

The court says:

"If, therefore, it was material for the plaintiffs, in order to state a cause of action entitling the town of Denver to the relief sought, or to any relief whatever (and we think it was), to allege the corporate existence of said town, we are of the opinion that the denials in the answer were sufficient to controvert that fact, and to require proof thereof."

If this be so, and we are not disposed to question it at this late day, it follows that there was in this case a complete failure of proof.

In *North Star Trading Co. v. Alaska-Yukon-Pacific Exposition, supra,* the question of the capacity of the plaintiff to sue came up at the trial under a denial of the allegation that the plaintiff corporation had paid its license tax. No proof was offered showing payment, and the defendant having declined to admit payment or waive the proof thereof, the court held that the action could not be maintained.

In *Thompson-Spencer Co. v. Thompson,* 61 Wash. 547, 112 Pac. 655, the thought is dominant that the

capacity of the plaintiff rested in the statute, rather than in some rule of practice, and might have been taken advantage of under a motion to dismiss at the trial, if the defendant had employed a specific objection upon that ground rather than a general objection that the evidence introduced did not show a right of recovery; indicating that, in the absence of a demurrer or answer (the issue in that case having been framed before the law was enacted), the objection should have been so taken that the omission might have been supplied by proof on the trial.

Being convinced that the issue is fairly drawn by the pleadings, and that the capacity of the respondent to sue is as much a matter of proof as of pleading, we hold that the action cannot be maintained.

The appellants having set up an affirmative defense, and the court having found counterclaims in favor of respondents that overcome the findings in favor of appellants, the appellants will take nothing. *North Star Trading Co. v. Alaska-Yukon-Pacific Exposition, supra.*

Reversed, and remanded with instructions to dismiss.

MAIN, C. J., TOLMAN, MITCHELL, and MACKINTOSH, JJ., concur.

[No. 14940. Department One. December 28, 1918.]

HANS MAUSETH, *Appellant*, v. R. H. SLAYDEN, *Respondent*.[1]

APPEAL (317)—RECORD—STATEMENT OF FACTS—CERTIFICATE AS TO ALL MATERIAL FACTS. A statement, to which no amendments were proposed, must be certified to contain all the material facts, notwithstanding Rem. Code, § 389, providing that it is deemed agreed to; in view of § 391, which requires a certificate as to all the material facts "or (as the case may be) such thereof as the parties have agreed to be all that are material," and which applies whether the statement be settled by the court or agreed to expressly or impliedly by counsel.

SAME (263)—RECORD—NECESSITY OF STATEMENT. In the absence of a statement certified to contain all the material facts, the court cannot pass upon errors in instructions and must dismiss the appeal.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered February 18, 1918, upon the verdict of a jury rendered in favor of the defendant, in an action for damages. Affirmed.

Browder Brown and *J. W. A. Nichols*, for appellant.

Gordon & Easterday, for respondent.

CHADWICK, J.—Plaintiff has appealed from a judgment entered on the verdict of a jury. The errors assigned are in the giving of certain instructions and in refusing to give certain instructions requested by the plaintiff. The plaintiff has brought only a partial statement of facts to this court. The trial judge has not certified that the statement contains all the material facts, matters and proceedings occurring in the cause, and defendant insists that the court will not pass upon the errors assigned, under the authority

[1]Reported in 177 Pac. 319.

of *Morgan v. Bankers' Trust Co.*, 63 Wash. 476, 115 Pac. 1047. See, also, *Weld v. Wheeler*, 90 Wash. 178, 155 Pac. 748.

Plaintiff contends, however, that, having filed all that part of the record which he deemed material as a statement of facts, and that no objections having been filed thereto, the proposed statement "shall be deemed agreed to." And that the statute providing that in such case the statement "shall be certified by the judge at the instance of either party," and the judge having certified that "the foregoing statement of facts, to which this certificate is attached, and the matters and proceedings embodied therein are matters and proceedings occurring in the said cause and on the trial thereof, and the same are hereby made a part of the record therein," is a sufficient compliance with Rem. Code, § 389, and that it is our duty to treat the statement as a complete statement of all the material facts, and to consider the errors complained of in the light of the statement which we have before us.

But to so hold would be equivalent to a holding that no certificate of the trial judge is necessary where no amendments have been proposed. That such a holding is beyond the power of the court is made plain by referring to Rem. Code, § 391, wherein the form of the certificate is suggested. The statute requires that the judge shall in all cases certify as to the materiality of the facts, matters and proceedings occurring in the cause, "or (as the case may be) such thereof as the parties have agreed to be all that are material therein." A reading of these two sections makes it clear beyond the peradventure of a doubt that, whether the statement is impliedly agreed to under § 389, or is agreed to in writing, or by stipulation in open court, it is essential that the trial judge certify

that the record contains all the material facts, matters and proceedings before this court will consider any claim of error predicated thereon. For, "even though the appeal be presented upon agreed statement of facts, it is necessary that it be properly certified by the trial court." *State v. Baxter,* 78 Wash. 405, 139 Pac. 196, citing *State ex rel. Hersner v. Arthur,* 7 Wash. 358, 35 Pac. 120, and *State v. Maines,* 26 Wash. 160, 66 Pac. 431.

The contention made by plaintiff was made in the case of *In re Holburte's Estate,* 38 Wash. 199, 80 Pac. 294, as will be seen by reference to the dissenting opinion of Rudkin, Judge. But the court, adhering to its former interpretation of the statute, held that we will, in all such cases, be controlled by the certificate of the trial judge, and if it does not there appear that all material facts, matters and proceedings are contained in the statement of facts, will refuse to consider it. In *Taylor v. Andres,* 83 Wash. 684, 145 Pac. 991, we said:

"The certificate being insufficient, the court will not look into the proposed statement of facts and attempt to determine from its contents whether it does in fact contain all the material facts and proceedings necessary to the consideration of the point involved. Had the certificate contained a statement that there were embodied in the statement of facts all the material facts, matters and proceedings not already a part of the record which were necessary to a determination of the question involved, a different question would be presented."

In this case the court followed *State ex rel. Miller v. Seattle,* 45 Wash. 691, 89 Pac. 152:

"It is neither certified that the statement before us contains all the material matters and proceedings occurring in the cause which are not already a part of the record, nor that it contains such thereof that the parties have agreed to be all that are material therein. The statute makes it the duty of the trial judge to so

certify when such are the facts. . . . In the absence of such a certificate it must, therefore, be presumed that the statement does not include all the material facts, and we are thus advised that all the material facts which were before the trial court and which controlled its action are not before us."

This is a holding, as we now hold, that whether the statement be settled by the court, or agreed to expressly or impliedly by counsel, the judge must nevertheless certify to the materiality of the facts contained in the statement. See, also, *Deller v. Long*, 96 Wash. 372, 165 Pac. 98.

Wherefore, upon the authority of *Morgan v. Bankers' Trust Co., supra*, the judgment of the lower court is affirmed.

MAIN, C. J., MACKINTOSH, and TOLMAN, JJ., concur.

[No. 14958. Department One. December 28, 1918.]

In the Matter of the Estate of SAMUEL LAVENBERG.[1]

EXECUTORS AND ADMINISTRATORS (60)—ALLOWANCE TO SURVIVING WIFE—NONRESIDENTS—STATUTES. A nonresident widow is entitled to the allowance of $3,000, under Laws 1917, pp. 670, 671, §§ 103, 104, providing that the home, household goods and property not exceeding $3,000 shall be set aside to the widow; since the law is not strictly a homestead or exemption law, but is based on charity to prevent dependency and is to be liberally construed; the widow being in no sense a contending party as to creditors.

SAME (59)—STATUTES (5)—CONTINUATIONS—ALLOWANCE TO SURVIVING WIFE. Although Rem. Code, § 1464, restricting a widow's allowance to $1,000 was repealed by the probate code of 1917 without saving existing rights, Laws 1917, pp. 670, 671, §§ 103 and 104, making the allowance $3,000 will be treated as a re-writing or amendment of existing laws, in view of Id., § 219, which provides that the court shall have full power and authority to settle the estate in any case where the provisions of the act are inapplicable or doubtful.

[1]Reported in 177 Pac. 328.

CONSTITUTIONAL LAW (85)—OBLIGATION OF CONTRACTS—EXEMPTION LAWS. An award to the widow on distribution of $3,000 under the act of 1917, pp. 670, 671, §§ 103 and 104, is not an impairment of the obligation of debts created by the decedent prior to the passage of that act, although it amends the existing law limiting the allowance to $1,000, where the residue of the estate going to the widow under the award was less than $1,000.

Appeal from an order of the superior court for King county, Smith, J., entered May 25, 1918, directing the payment of the residue of an estate for the use and support of a widow and minor children, after a hearing before the court. Affirmed.

G. E. Steiner and *C. C. Curtis,* for appellants.

Alexander Stewart and *Robert D. Hamlin,* for respondent Jennie Lavenberg.

Chas. M. Fouts, for respondent Levy.

CHADWICK, J.—There are two questions in this case.

I. Is a nonresident wife, surviving a husband who lived and did business in this state, entitled to an award of property under §§ 103 and 104, Laws of 1917, pp. 670, 671, when the husband has never maintained a home or dwelling-house, and consequently no homestead has been claimed in the lifetime of the deceased, and there is no property subject to be claimed as a homestead.

Samuel Lavenberg, in his lifetime, operated a small tailoring business in Seattle. His wife and family lived in New York. The husband and wife were not separated in any legal sense. The estate consists of the proceeds of shop tools and equipment and of a small stock of goods, purchased from the now complaining creditors a short time before Lavenberg's death, and not exceeding in value the sum of $1,300. After the payment of preferred claims, there will re-

main less than $1,000, which the court ordered set aside to the use of the widow.

Appellants contend that the award of the whole of a small estate can only be made where one of two conditions occur: (a) where no homestead has been claimed in the manner provided by law; and (b) where the homestead, if claimed, is less in value than the sum of $3,000, in which event an award may be made which, including the home and household goods, shall not exceed in value the sum of $3,000.

It is further contended that homestead laws being primarily intended for the benefit of residents of the state in which they are enacted (21 Cyc. 470), and the property of nonresidents not being exempt from execution or attachment (Rem. Code, § 571), it follows that the property of the estate is subject to the claims of creditors, and cannot be claimed as a homestead or in lieu of a homestead.

But the confusion of appellants' argument lies in the fact that the laws under which the award is made are not, strictly speaking, homestead and exemption laws. Although construed as analogous statutes, they in no sense pertain to the rights of debtor and creditor. Like the general laws exempting homesteads and certain personal property, they rest in a sound public policy and are calculated to prevent dependency, but they sound deeper in the policies upon which homestead and exemption laws are made to rest.

"Statutes of this character are founded on charity, they are remedial and partake of the nature of, but are not strictly, exemption laws." *In re Heilbron's Estate,* 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602.

"It was the duty of the father to provide for his family during his lifetime, and to provide for them at all hazards, even as against the rights of creditors, and the law, during the administration of the father's

estate, simply steps into his shoes and insists upon making the same provision for the family." *Griesemer v. Boyer,* 13 Wash. 171, 43 Pac. 17.

If the widow were claiming a homestead, or property in lieu of a homestead, under the general law, she must have been a resident of the state at the time to take the benefit of the statute, but to the setting aside of the homestead or property in lieu thereof where the estate does not exceed in value a certain sum, the widow is in no sense a contending party and the court is given no discretion. A judicial duty imposed by the legislature compels the setting apart of the property, and against the order of the court nothing will avail unless it be the voluntary renunciation of the widow. It is the policy of our probate law, now evidenced by §§ 103, 104, Laws of 1917, pp. 670, 671, that compels rejection of the general rule that homesteads and lieu exemptions cannot be claimed by nonresidents. For, as against an imperative duty, no qualification of residence being imposed, the courts will look only to the relationship and not to the place of residence. "It is an absolute right that the statute gives unqualified by collateral conditions." *Griesemer v. Boyer, supra.*

In the case just cited, although not necessary to a decision upon the facts as found by the court, the right of a widow, although a nonresident, to take property under the probate exemption was advanced as a sound theory.

II. But if these things be so, appellant insists that, inasmuch as the statute under which the award was made was passed after the greater part of the debts were incurred, the award will operate to impair the obligation of the several contracts, and must therefore fail *pro tanto.*

In re Heilbron's Estate, supra, with its succeeding line, are relied on. We do not feel called upon to discuss these cases, for in any event appellants take on distribution and not by execution, and so taking, they can have no advantage other than that given by the law existing at the time the debts were contracted. Under the old law, the sales were made subject to a widow's exemption of property in a sum not exceeding the sum of $1,000. Rem. Code, § 1464.

While this section seems to have been repealed without saving existing contract rights or pending cases (Laws of 1917, p. 707, § 223), we think § 219 warrants us in treating §§ 103 and 104 (pp. 670, 671) as a rewriting or amendment of the then existing law, and when so considered we have no hesitation in holding that appellants can claim nothing, it being certain that the residue of the estate, after paying preferred claims, is less than $1,000.

Affirmed.

MAIN, C. J., MACKINTOSH, MITCHELL, and TOLMAN, JJ., concur.

[No. 14987. Department One. December 28, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. FRED LOWERY, *Appellant*.[1]

INSURRECTION—CRIMINAL ANARCHY — INFORMATION — SUFFICIENCY. An information sufficiently charges criminal anarchy where it alleges in concise language the violation of Rem. Code, § 2563, subds. 1 and 4, by advocating the overthrow of organized government by unlawful means, to wit, the organization of the Industrial Workers of the World whose purpose was the anarchistic overthrow of the government, and that defendant was a member of and had voluntarily assembled with the organization for such purpose.

CRIMINAL LAW (140)—EVIDENCE—EXECUTION OF COMMON PURPOSE —CRIMINAL ANARCHY—PROPAGANDA. In a prosecution for criminal anarchy by a member of the I. W. W., propaganda issued by authority of the order, some taken from the defendant, is admissible for the purpose of showing the aims and methods of the organization and to prove that it was bent on forcibly and anarchistically overthrowing the government of the United States, and also as declarations of co-conspirators engaged with the defendant, who was shown to be not only associated with but a member of the order.

SAME (139)—HEARSAY—UNOFFICIAL REPORTS. In a prosecution for criminal anarchy by a member of the I. W. W., the report of an unofficial organization or mediation commission appointed by the President of the United States, not connected with the I. W. W., as to its aims and purposes is not admissible, the witness not testifying as to an investigation or report that he had made himself.

SAME (197)—TRIAL—INDORSEMENT OF NAMES OF WITNESSES. The names of witnesses used by the state in rebuttal need not be indorsed on the information.

Appeal from a judgment of the superior court for Pacific county, Hewen, J., entered June 20, 1918, upon a trial and conviction of criminal anarchy. Affirmed.

H. E. Foster, for appellant. Charging an offense in the language of the statute is insufficient where opinions and conclusions are used. *United States v. Hess*, 124 U. S. 483.

[1]Reported in 177 Pac. 355.

The obligation which an initiate in a labor union is required to take is to be construed with reference to the declared purposes of the organization, and is binding only in so far as those purposes are lawful and are to be attained by lawful means; and when such union attempts the accomplishment of an object which is foreign to the purpose for which it is organized, a member is not responsible. *Schneider v. Local Union 60 etc.,* 116 La. 270, 40 South. 700, 114 Am. St. 549, 5 L. R. A. (N. S.) 891; *Thomas v. Mutual Protective Union,* 49 Hun (N. Y.) 171; *Austin v. Searing,* 16 N. Y. 112, 69 Am. Dec. 665; *Gaston v. Drake,* 14 Nev. 175, 33 Am. Rep. 548; *Nichols v. Mudgett,* 32 Vt. 546.

John I. O'Phelan (Clarence L. Reames, of counsel), for respondent, contended, *inter alia,* that the charge in the information is direct, positive and sufficient. Rem. Code, § 2055; *State v. Quinn,* 56 Wash. 295, 105 Pac. 818; *Sheridan v. United States,* 236 Fed. 305.

The appellant cannot object to the information in this respect, not having demanded a bill of particulars. 22 Cyc. 371; *State v. Lewis,* 31 Wash. 75, 71 Pac. 778; *State v. Dix,* 33 Wash. 405, 74 Pac. 570; *State v. Owen,* 97 Wash. 466, 166 Pac. 793; *State v. Pierson,* 101 Wash. 318, 172 Pac. 236; *Holmgren v. United States,* 217 U. S. 509; *Connors v. United States,* 158 U. S. 408.

The information being in the language of the statute is sufficient. Rem. Code, §§ 2055, 2065; *Spies v. People,* 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. 320; *Spies v. Illinois,* 123 U. S. 131; *State v. Brummett,* 98 Wash. 182, 167 Pac. 120; *State v. Turner,* 10 Wash. 94, 38 Pac. 864; *State v. Jakubowski,* 77 Wash. 78, 137 Pac. 448; *State v. Martin,* 94 Wash. 313, 162 Pac. 356; *State v. Cotz,* 94 Wash. 163, 161 Pac. 1191; *State v. Bartow,* 95 Wash. 480, 164 Pac. 227; *State v. Richter,*

95 Wash. 544, 164 Pac. 250; *State v. Schuman,* 89 Wash. 9, 153 Pac. 1084, Ann. Cas. 1918A 623; *Sheridan v. United States, supra; Armour Packing Co. v. United States,* 209 U. S. 56; *Powers v. United States,* 223 U. S. 303; *Dunbar v. United States,* 156 U. S. 185.

The pamphlets are admissible, because the declarations of those engaged in combination to do an unlawful act are admissible against one another, when such declarations refer to the common object or the means of attaining such common object. *Spies v. People* and *Spies v. Illinois, supra*; *Wiborg v. United States,* 163 U. S. 632; *St. Clair v. United States,* 154 U. S. 134; *State v. Williams,* 62 Wash. 286, 113 Pac. 780; *State v. Dilley,* 44 Wash. 207, 87 Pac. 136; *State v. Pettit,* 74 Wash. 510, 133 Pac. 1014; *State v. Pettit,* 77 Wash. 67, 137 Pac. 335; *State v. Wappenstein,* 67 Wash. 502, 121 Pac. 989; *Borrego v. Territory,* 8 N. M. 446, 46 Pac. 349.

The court did not err in excluding the report of the mediation commission. 17 Cyc. 421; *Morris v. Harmer,* 7 Pet. (32 U. S.) 554.

The court committed no error in its instructions. *Spies v. People* and *Spies v. Illinois, supra*; *Edwards v. State,* 69 Neb. 386, 95 N. W. 1038; *State v. Cline,* 27 S. D. 573, 132 N. W. 160; *State v. Martin,* 195 S. W. (Mo.) 731; *People v. Phillips,* 27 Cal. App. 409, 150 Pac. 75; *State v. Ross,* 85 Wash. 218, 147 Pac. 1149.

The instructions on the subject of reasonable doubt were correct. *Barker v. Commonwealth,* 90 Va. 820, 20 S. E. 776; *State v. Krug,* 12 Wash. 288, 41 Pac. 126; *State v. Aurand,* 76 Wash. 529, 136 Pac. 1139; *State v. Quinn,* 56 Wash. 295, 105 Pac. 818; *State v. Harsted,* 66 Wash. 158, 119 Pac. 124; *State v. Wappenstein, supra; State v. Ross,* 85 Wash. 218, 147 Pac. 1149.

MACKINTOSH, J.—The defendant was convicted of the crime of criminal anarchy. Section 2563, Rem. Code, provides that every person who:

"(1) By word of mouth or writing shall advocate, advise or teach the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or . . .

"(4) Shall organize or help to organize or become a member of or voluntarily assemble with any society, group or assembly of persons formed to teach or advocate such doctrine . . ."

shall be guilty of criminal anarchy.

The information was as follows:

"That they, the said Fred Lowery and Charlie Brown, the defendants above named, on or about the 23d day of March, 1918, in Pacific county, Washington, then and there being, did then and there willfully, wrongfully, feloniously and anarchistically advocate, teach and advise the duty, necessity and propriety of overthrowing and overturning the organized government of the United States of America, by the unlawful means of an organization known as the Industrial Workers of the World, the aim, object and purpose of which said Industrial Workers of the World is the violent, felonious and anarchistic overthrowing and overturning of the Government of the United States by means of the members of that organization arising en masse in willful, wrongful, felonious, forcible and anarchistic opposition to the Government of the United States; and they the said defendants then and there being, did then and there organize, help to organize, and become members of, and voluntarily associate and assemble with, the said Industrial Workers of the World, the said Industrial Workers of the World being a society, group and assembly of persons, organized, operating and existing in divers and sundry places in the state of Washington and in other states of the United States, formed

to teach, advocate and disseminate the anarchistic doctrines of the said Industrial Workers of the World, that the said association and the members thereof should violently, feloniously and anarchistically rise up en masse and forcibly and violently overthrow and overturn the organized Government of the United States of America by such unlawful means."

The defendant demurred to this information, claiming that it was insufficient in that it did not charge the defendant with any offense, and did not recite facts, but mere conclusions. As we read the information, it is not vulnerable to the attack thus made upon it. It charges in plain, clear and concise language the violation of subdivisions (1) and (4) of Rem. Code, § 2563, by alleging that the defendant advocated the overthrow of organized government by unlawful means, to wit, by an organization known as the Industrial Workers of the World, which organization has for its purpose the anarchistic overthrow of government; and that the defendant was also guilty in that he was a member of, or had voluntarily assembled with, this organization formed to propagate anarchical doctrine. The information, surely, is sufficient to notify the defendant of the charge which he is called upon to defend against; it specifies the time, the place, and the means by which the crime is alleged to have been committed, and it so charges it that a person of common understanding cannot mistake its meaning. Had the defendant not been satisfied that the facts had been plead with sufficient elaboration to fully apprise him of the charge, he could have demanded that this enlightenment be furnished him by means of a bill of particulars, but he did not seek that source of information, being content to demur to the information, which charges the crime substantially in the language of the statute, and states the acts which

constitute the offense in ordinary and concise language. The demurrer to the information was properly overruled.

The defendant next complains that the court erred in receiving evidence tending to sustain the recitals in the information. This complaint is directed to some twenty-six exhibits offered and received in evidence over the defendant's objection. They consist of various written propaganda issued by the Industrial Workers of the World, much of which is inflammatory in character, and some of which had been taken from the person of the defendant at the time of his arrest. All these documents were sufficiently proven to have been issued under the authority of the Industrial Workers of the World, and were admissible for the purpose of showing the aims, objects and methods of that organization, and to prove the assertion that the organization was bent on forcibly, violently and anarchistically overturning and overthrowing the government of the United States. This was all admissible against the defendant, there having been introduced evidence sufficient to go to the jury establishing that the defendant himself was not only associated with, but was a member of such organization. The defendant claims that he is not responsible for the recitals contained in the exhibits. That is beside the question, because the defendant made these doctrines his own by accepting membership in the organization by which they were promulgated, and an exposition of whose principles they represent. They were also admissible on the theory that they were declarations of co-conspirators engaged with the defendant in the furtherance of an unlawful purpose.

The defendant predicates error upon the exclusion by the court of testimony which he offered through certain witnesses as to what the members of a media-

tion commission, an unofficial organization appointed by the president of the United States to investigate the causes of labor unrest, had reported, the purpose being to have the witness on the stand testify that this unofficial organization had discovered and reported that the Industrial Workers of the World was not, in fact, an anarchical organization. This testimony was properly excluded for the reason that the witness was not testifying as to any investigation he himself had made, but was attempting to testify to some report which was not official and in no way a public record, and a report which was neither made by, nor a part of the records of, the Industrial Workers of the World, and with which the defendant himself had never had any connection. The persons making the report were not members of the Industrial Workers of the World, nor, so far as disclosed, were in any way associated or affiliated with that organization. The statements contained in the report, therefore, could not have come from that organization, nor can they be considered as the authorized statement of the principles of the organization. There was nothing in the report to indicate that the ones making it were specially delegated to investigate the organization, nor is there any suggestion that the persons making the report could not have been secured as witnesses, and, if they were qualified, to have testified to the reputation of the Industrial Workers of the World, as did other witnesses put on the stand by the defendant for that purpose. It is certainly not permissible for a witness on the stand to testify as to what someone else, even though cloaked with the title of a mediation commissioner, may have thought from his investigation of the Industrial Workers of the World as to their doctrines. This violates all the rules of hearsay testimony.

Some point is made of the fact that the court permitted persons to testify whose names had not been indorsed on the information, these witnesses having been used in rebuttal. This court has repeatedly held that the names of witnesses used by the state in rebuttal need not appear on the information. *State v. Champoux,* 33 Wash. 339, 74 Pac. 557.

The final claim of error is that the court erroneously instructed the jury by refusing to give certain requested instructions and by the giving of improper ones. The defendant's argument upon this phase of the case is confined largely to the mere statement that certain instructions were erroneous. We have examined the instructions as given and, taken as a whole, they presented to the jury a fair and correct statement of the law applicable to the charge, and the substance of the instructions requested but not given was included in the court's charge.

We are satisfied that the information was sufficient and that the defendant received an impartial and fair hearing, and was found guilty by a jury which had been properly instructed. The judgment, therefore, of the court below on the verdict of that jury will be affirmed.

MAIN, C. J., CHADWICK, MITCHELL, and TOLMAN, JJ., concur.

[No. 14995. Department One. December 28, 1918.]

PACIFIC POWER & LIGHT COMPANY, *Respondent*, v. W. H. WHITE *et al.*, *Appellants*.[1]

PRINCIPAL AND AGENT (7)—RELATION—TESTIMONY OF AGENT. The agent is competent to testify to the fact of agency.

SAME (9)—RELATION—EVIDENCE—SUFFICIENCY. An agency is sufficiently established where it was testified to by the agent, and proven by letters from the principal to him, and by evidence of payments and other transactions between them.

CONTRACTS (104)—MODIFICATION—CONSIDERATION. Where a contract is based upon a sufficient consideration, it is enough to support a subsequent modification by a supplemental agreement.

APPEAL (473)—REVIEW—LAW OF CASE. The decision on a former appeal upon demurrer to the complaint, sustaining the sufficiency of the facts alleged, becomes the law of the case, and is conclusive on the second appeal after trial on the merits.

Appeal from a judgment of the superior court for King county, French, J., entered June 20, 1918, upon findings in favor of the plaintiff, in an action for breach of warranty, tried to the court. Affirmed.

Charles E. Patterson and *Fred W. Neal*, for appellants.

John A. Laing and *Kerr & McCord*, for respondent.

MACKINTOSH, J.—After the decision of this court in *Pacific Power & Light Co. v. White*, 96 Wash. 18, 164 Pac. 602, that the complaint in this case stated a cause of action, a trial was had, resulting in a judgment for the plaintiff, from which the defendants appeal. The facts are sufficiently stated in the former opinion. The defendants present their claims of error as follows:

I. (a) That the proof did not establish Fullen as the agent of the plaintiff, and (b) that the acts, decla-

[1]Reported in 177 Pac. 313.

rations and admissions of Fullen should have been received in evidence to disprove such agency.

(a) As we read the testimony it is replete with satisfactory and convincing proof of the agency; it was sworn to by the agent, who was competent to establish the fact (*Bender v. Ragan,* 53 Wash. 521, 102 Pac. 427); it was proven by letters from the plaintiff to Fullen; it was established by the fact that the plaintiff furnished the money with which to make the purchase; it was testified to by the officers of the plaintiff; it was evidenced by the payment to Fullen of compensation for his services as agent.

(b) Assuming that the acts, declarations and admissions of Fullen were improperly excluded, we have in this court taken them into consideration as they appear in the offered exhibits and offers of proof, and find that they do not negative the finding of agency. At the most, they establish that the plaintiff was an undisclosed principal, and the defendants were in the same situation as any other persons dealing with one who has revealed nothing as to his agency at the time the negotiations are taking place. How the defendants were adversely affected by the fact that the plaintiff and not Fullen was the real purchaser is not apparent, their only claim being that they would not have sold to the Yakima Valley Power Company, which company was subsequently also purchased by the plaintiff, and there was not even an offer to prove that they had been unwilling to sell to the plaintiff itself at the time they sold, as they now claim, to Fullen personally.

II. That there was no consideration for the contract of September 19, 1916, and that offers of proof to that effect were improperly denied.

The record, after trial, presents no different question from that which we determined on the demurrer,

and we then held that there was a good consideration plead for the contract, and the offered proof went only to the establishment of this contract as supplemental to the one of September 8, and if that one was based on sufficient consideration, it was enough to support the subsequent modification. *Stofferan v. Depew,* 79 Wash. 170, 139 Pac. 1084. Assuming the fact to be that the later contract was not signed until after the stock had been transferred and paid for, yet this does not disprove that the signing of the contract of warranty was a part of one transaction.

III. That the evidence shows the warranty in the contract of September 19, 1910, was only against undisclosed or contingent liabilities, and proof should have been received tending to show that the liability here sued on was known to Fullen on September 19, 1910. This question was disposed of adversely to the defendants on the former appeal and has become the law of the case.

IV. That the contracts of September 8 and 19, 1910, were the personal contracts of Fullen, and the plaintiff could not be substituted as an undisclosed principal. The former opinion and what we have said in this one in discussion of the first point decide this suggestion against the defendants. Judgment affirmed.

MAIN, C. J., CHADWICK, MITCHELL, and TOLMAN, JJ., concur.

[No. 15020. Department One. December 28, 1918.]

DEER PARK LUMBER COMPANY, *Respondent*, v. OREGON-WASHINGTON LUMBER & MANUFACTURING COMPANY, *Appellant*.[1]

APPEAL (458, 459)—REVIEW—HARMLESS ERROR—FACTS OTHERWISE ESTABLISHED. The exclusion of a letter is harmless where its contents was brought out on cross-examination.

EVIDENCE (168, 175) — PAROL TO VARY WRITING — PRIOR AGREEMENTS—AMBIGUITY. Previous correspondence and evidence of negotiations leading up to a contract for the sale of lumber is not admissible, where there was a complete unambiguous contract by correspondence whereby plaintiff refused to accept defendant's first order but submitted a confirmation order that was accepted by defendant, and the previous correspondence could throw no light on the terms of the agreement made.

SALES (166)—COUNTERCLAIM FOR DAMAGES—INSTRUCTIONS. Upon an issue as to breach of a contract for the sale of lumber, error cannot be predicated upon the failure to include a charge that the obligation to deliver is as great as the obligation to make payment, where the court properly instructed as to the duty of the seller to deliver and make performance, and as to the mutuality of the obligations.

APPEAL (460)—REVIEW — HARMLESS ERROR—INSTRUCTIONS—PREJUDICIAL EFFECT. Error in instructions as to the defendant's measure of damages on counterclaim for breach of contract, is harmless, where the jury found for the plaintiff in the exact amount claimed, thus finding that there was no breach of contract.

Appeal from a judgment of the superior court for King county, Frater, J., entered June 4, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

McClure & McClure, Tucker & Hyland, and *Walter S. Osborn*, for appellant.

Carroll B. Graves, for respondent.

TOLMAN, J.—Respondent sued to recover $8,773.50 and interest, a balance alleged to be due to it for lum-

[1]Reported in 177 Pac. 336.

ber sold and delivered to appellant. It was admitted that appellant was entitled to a credit for the amount of the expense bills held by it, and upon their production, the contract price of the lumber delivered was agreed to be $4,458.34. Appellant, by way of defense and counterclaim, set up and sought to prove a breach of a contract to deliver a specified amount and grade of lumber at specified prices within a specified or reasonable time. The case was tried to a jury, which brought in a verdict for the exact agreed contract price of the lumber delivered, upon which verdict judgment was entered, and from which this appeal is taken.

The issues made up under the counterclaim in the answer related to three contracts, one covering western pine shop lumber, or shop lumber, the second covering pine moldings, and the third, number four pine boards. The main controversy was over the shop lumber, and the errors assigned do not appear to extend beyond the proceedings relating thereto.

On March 14, 1917, appellant telegraphed an inquiry to respondent as to prices of shop lumber, and respondent replied by letter of March 15, enclosing a schedule of prices. On receipt of that letter, on March 16 appellant wired an inquiry as to how much and what specifications and grades of shop lumber could be furnished at such prices, in reply to which respondent wrote a letter, dated March 17, which reads as follows:

"We are writing you promptly instead of wiring you regarding our present position to handle your western pine shop orders, because we feel that we cannot make our position sufficiently clear to you in a telegram.

"We have in pile at this time waiting for the stock to air dry, about 750,000 of No. 3 and better shop. This stock is about 70% 6-4, 20% 8-4 and 10% 5-4,

and it will grade about 40% No. 3, 50% No. 2, and 10% No. 1. A large part of this stock was put in pile in January, so it would be beginning to be in shipping condition in May.

"You understand we have been kiln drying part of our shop during the winter, but that which we have been kiln drying we have been shipping out on orders, so the only surplus we have to offer is this 750,000 which we have piled in the yard to air dry. We are adding to this 750,000 every day at the rate of about 10,000 per day. If the orders which you have in mind require more of the 5-4 than we have on hand, we could begin to saw more of the 5-4."

On receipt of this letter, appellant sent a telegram purporting to accept what it termed respondent's offer to sell shop lumber, and followed the telegram with an order dated March 21, as follows:

750,000′ or more up to 1,000,000′.

5/4, 6/4 and 8/4 Western Pine factory lumber, bright stock, either air dried or kiln dried.

2,300 lbs.

About 10%	5/4 & 6/4	No. 1	Shop	S2S	Standard	.....	$41.00
" 50%	"	No. 2	"	"	"	.....	31.00
" 40%	"	No. 3	"	"	"	.....	26.00
"	8/4	No. 1	"	"	"	.....	44.00
"	8/4	No. 2	"	"	"	.....	34.00
"	8/4	No. 3	"	"	"	.....	27.00

Shipments to commence May 1st or sooner if possible to ship absolutely dry stock, confirming our wire March 20th, 1917. Stock to be 70% 6/4; stock to be 20% 8/4; stock to be 10% 5/4.

On receipt of the telegram and before the receipt of the order, respondent wrote a letter under date of March 21, saying, in effect, that when the lumber would be fit to ship depended upon the weather, and they would not agree to ship at any specified time, but would only ship as the lumber reached shipping condition, and

"Also, we do not care to guarantee the percentage of grades which the stock will probably develop. Another feature which is along the line of what we wrote

you the other day, on a contract for a large amount of shop, we would much prefer to invoice direct to the customer, and our doing so in a case of this kind would not result in your sacrificing in any way your identity as a wholesaler, because the dealings would all be with one concern."

And upon receipt of appellant's proposed order of March 21, respondent immediately wired its refusal to accept the same. Thereupon appellant's manager went to Deer Park and some personal negotiations were had. After all of this correspondence, and after the personal negotiations, the minds of the parties appear to have met, and the trial court instructed the jury that the contract between them was shown by appellant's order of March 21, respondent's confirmation order of March 31, the letter of April 7 transmitting the confirmation order, and appellant's acknowledging letter of April 10. The first of these has already been quoted herein. The confirmation order does not vary therefrom in amounts and prices, but describes the lumber as number three and better, shop pine, as stock runs, to be shipped as soon as possible, terms as per agreement, and requests immediate telegraphic advice if there is any error therein, and the letter of transmissal is as follows:

"Herewith our confirmation of your order No. 1265, which we have entered under our Mill No. 2038, order calling for from 750,000 to 1,000,000 feet of factory lumber, prices on our confirmation being net to us, and terms as per agreement that you are to advance 95 per cent of face of each invoice after deducting freight and that you will make a special effort to forward to us promptly all final remittances.

"It is our understanding on all shipments to you that you are willing to advance us 95 per cent, but I note by a remittance received from you yesterday that you advanced but 85 per cent. We thought we would let this one car pass, but please understand that in

future shipments it will be necessary for us to insist upon your advancing 95 per cent.

"We are several days late in mailing you our confirmation of your order for factory, because orders have been coming in faster than we have been able to write them up and mail back the confirmations."

Appellant's letter of April 10 acknowledges receipt of respondent's letter of April 7, and of the confirmation order enclosed, expresses satisfaction therewith, and says:

"We have instructed our accountant to make you advance payments of ninety-five per cent of the mill value, less two per cent cash discount on regular terms."

Appellant's first contention is that the trial court erred in withdrawing from the consideration of the jury the letter written by respondent under date of March 17. Notwithstanding that the court had instructed that the contract was shown by subsequent letters and documents, counsel for appellant appears to have been commenting on this letter in his argument to the jury, when an objection was interposed and counsel said:

"I am not arguing this as a part of the contract . . . Not as a part of the contract at all. I don't contend it is a part of the contract. It is a statement of fact though as to what they had on hand in that yard at that time, and presumably should be correct if Mr. Wilson was truthful in his letter. It is his letter, not our letter. It is one of those letters which goes in this correspondence as throwing light upon the bona fideness of this transaction and gives you some understanding as to who breached this contract."

Assuming, therefore, that the letter was a statement or admission by respondent against interest as to the grade of the shop lumber in its yard, was appellant

prejudiced by its exclusion. On cross-examination of the secretary of respondent, who wrote the letter, the following took place:

"Q. So that your lumber piled in your yard or in your dry kiln you know from your experience, if you are an experienced lumberman, on an average how your stock will run unless you have had extraordinary climatic conditions, do you not? A. We couldn't any more than guess at it. Q. Can you tell within a reasonable percentage how your stock is running, and can't any other lumberman tell within three or four per cent? A. I have always felt that I knew so little about it that I wouldn't take an order and guarantee anything about percentages, that is how much I know about it? Q. I didn't ask you what you would guarantee. You don't know enough about it to express an opinion now and again? A. An opinion, yes, but I wouldn't take an order on that basis. Q. And when you wrote this letter on March 17th to the Oregon-Washington Company and said, 'We have in pile, waiting for the stock to air dry about 750,000 feet of No. 3 and better shop. This stock is about 70 per cent 6-4, 20 per cent 8-4 and 10 per cent 5-4 and it will grade about 40 per cent No. 3, 50 per cent No. 2, and 10 per cent No. 1,' was only the expression of an opinion, and simply a guess as to what was in your lumber pile? A. That is correct. Q. And you didn't intend it to be anything but a guess? A. Certainly not. Q. And you intended that the Oregon-Washington people should take that just as a guess? A. Certainly, they understood it that way."

It appears, therefore, that the contents of the letter were fully made known to the jury, and appellant had the full benefit thereof. While, with a proper caution to consider it only for the purpose indicated by counsel, the letter might have been admitted, yet we cannot say, in the light of the cross-examination referred to, that its exclusion was prejudicial error.

It is also contended that the instructions as to what

communications constituted the contract between the parties was erroneous, and it may be conceded that, when the contract is ambiguous, the statements and communications of the parties leading up to it may be received in evidence for the purpose of aiding to determine what the contract is. But a complete and unambiguous contract merges all prior communications and negotiations within itself and requires no explanation. For instance, in its order appellant asked respondent to contract to ship lumber which should be 10 per cent No. 1, 50 per cent No. 2, and 40 per cent No. 3. Had respondent accepted the order as made, there would have been a contract without ambiguity. Respondent, however, declined to accept the order as made, notified appellant that it would not guarantee percentages of grades, and in its confirmation order provided that the percentages should be as the stock ran. And appellant having accepted the confirmation order, that became the contract. The previous correspondence could throw no light upon the meaning of the words "as stock runs," and, so far as we can gather from the record, there is no dispute of the fact that these words mean exactly what they imply, and clearly and expressly negative the idea that the percentages were fixed and guaranteed. Hence the previous correspondence, while it may have been confusing and misleading, could not have aided the jury in determining what the contract really was.

It is next contended that the jury was not properly instructed with regard to the breach of the contract, errors being assigned both on the instructions given and those refused. It is argued that the instructions given fail to include a charge that the obligation to deliver on the part of the seller is as great as that of the buyer to make payment, and that failure on the part of respondent to make proper delivery would ex-

cuse subsequent default in payment by the buyer. But we think the jury could not have been misled in that respect. The court clearly pointed out in the instructions given that the respondent must have been at all times ready and willing to perform its part of the contract, and only the appellant's failure to perform on its part would excuse such performance, and further, that the party who had first breached the contract had no cause of complaint against the other for its failure to further comply with the contract. The jury could only conclude from these instructions that the obligations of the contract were mutual and as binding upon one party as the other, and must have further concluded that, if respondent had first breached the contract, it could not thereafter justify such breach by complaining of appellant's subsequent failure to pay. We think these instructions as a whole sufficiently stated the law.

Appellant appears to place great reliance upon its assignments of error based upon the instructions given and refused as to the measure of damages. Assuming that the court did err in this respect, can such error now be of any importance whatever? Had the jury found that respondent breached the contract, some damages would have resulted to appellant, even under the instructions as given, and must have been reflected in the verdict. The jury, however, found a verdict for the exact sum which it had been agreed was the purchase price of the lumber delivered, and must therefore have accepted respondent's theory of the case, have found that it did not breach the contract, and that, therefore, appellant did breach the contract, and, if so, of course, it would be entitled to recover or offset nothing, no matter what rule might have been given to the jury as to the measure of damages. Erroneous instructions as to the measure of

damages are not ground for reversal where the jury rejected the whole claim for damages. *Catton v. Dexter*, 70 Ill. App. 586; *Hamilton v. Matlock*, 22 Ind. 47.

Finding no reversible error, the judgment appealed from will be affirmed.

MAIN, C. J., MACKINTOSH, CHADWICK, and MITCHELL, JJ., concur.

[No. 15050. Department One. December 28, 1918.]

J. L. PICKERING *et al.*, *Appellants*, v. VICTOR A. ROEDER *et al.*, *Respondents*.[1]

EVIDENCE (153)—PAROL TO VARY WRITING—RECEIPT. A receipt or release is not a contract or evidence of a contract and may be explained or contradicted by parol evidence.

ASSIGNMENTS FOR BENEFIT OF CREDITORS (30)—SECURED CLAIM—RELEASE—EFFECT UPON COLLATERAL. Where an assignment for the benefit of creditors provided that it was in full settlement of claims and that an acceptance of benefits would constitute a full release, collateral security held by a creditor is not released by the creditor's receipt stating that it was given in consideration of sharing in the proceeds *pro rata* with other creditors, and granting a complete release of all indebtedness.

SAME (30). A lawful priority, established by pledging collateral at the time a loan was made, is not waived or released by accepting dividends from a subsequent assignee for the benefit of creditors, in the absence of acts showing a clear intention to do so.

SAME (30). Where a secured creditor accepted dividends on his entire claim at the request of the owner of the collateral, and creditors had knowledge thereof and took no steps to protect their rights, it was to the advantage of the owner of the collateral, who cannot assert that the collateral was thereby released.

Appeal from a judgment of the superior court for Whatcom county, Brawley, J., entered March 20, 1918, upon findings in favor of the defendants, in an action for equitable relief, tried to the court. Affirmed.

[1]Reported in 177 Pac. 321.

R. W. Greene, for appellants.

Sather & Livesey, for respondents.

TOLMAN, J.—In April, 1913, appellant J. L. Pickering, who had theretofore been one of the stockholders of the Pickering Hardware Company, a corporation, acquired all of the capital stock of that corporation, for which purpose he borrowed $7,700 from respondent, and evidenced the debt by a note for that amount, signed by the corporation and by himself individually, and pledged as collateral security therefor 250 shares of the corporate stock. In February, 1916, respondent made a further loan of $2,500, evidenced by a note for that amount, also signed by the corporation and by Pickering, and as collateral security therefor, Pickering assigned to respondent a life insurance policy, a real estate contract covering the property occupied by him as a homestead, gave a bill of sale of an automobile, and deeds covering two pieces of real estate which belonged to the corporation. In February, 1917, the corporation was without funds to pay its obligations in the ordinary course of business, and after some unavailing negotiations looking toward the taking over of the business by the respondent and the settlement by him of the claims of other creditors, an assignment was made by the corporation and by Pickering to the Seattle Merchants' Association. The assignment was in the usual form, except that it was therein provided:

"It is understood and agreed that all creditors shall accept the proceeds of this assignment in full settlement of their accounts, and their acceptance of benefits hereunder shall constitute a full release."

And, also, the assignment purported to convey to the assignee all of the property of the assignors, excepting only the homestead here in controversy, and

household goods and wearing apparel exempt by law. Pickering surrendered no property under the assignment, excepting only the 250 shares of the capital stock of the corporation pledged to respondent as security for the $7,700 note; and the only apparent purpose of his joining in the assignment was to secure a discharge from the obligations which he had assumed on behalf of the corporation. The assignment was drawn by respondent's attorney, but respondent was in California at the time and had no personal knowledge of the provisions therein contained which have just been pointed out. After respondent returned from California, and while confined to his home by illness, he, on March 21, 1917, executed proof and assignment of his claim to the assignee, and a formal release of J. L. Pickering, as follows:

"In consideration of the assignment of Pickering Hardware Company and J. L. Pickering of all their assets not exempt from execution to Seattle Merchants' Association, a corporation, for the benefit of creditors, and in further consideration of our sharing in the proceeds of said assignment *pro rata* with the other creditors in the order of priority provided by law, the undersigned hereby grants to said J. L. Pickering a complete release from all indebtedness to the undersigned.

"Dated at Bellingham, Wash., this 21st day of March, 1917. Victor A. Roeder."

These instruments appear to have been prepared and sent to respondent by the assignee, and to have been executed without reading or other examination, upon the supposition that they were purely formal. During all of this time, and until the sale of the merchandise assets to others some time later, it appears to have been understood between Pickering and respondent that, if the merchandise assets could be purchased from the assignee at a satisfactory price, re-

spondent should buy them, and a new business enterprise should be organized in which both Pickering and respondent should be interested. Early in May the merchandise was sold to others at a price above that which respondent was willing to pay, and shortly thereafter Pickering for the first time asserted a right to the collateral which he had pledged to secure the payment of the $2,500 note, and demanded its return to him. The demand was refused. Respondent, about that time, received from the assignee a dividend of forty per cent upon his claims, and Pickering then brought this action to recover the collateral. By way of defense and counterclaim, respondent demanded the foreclosure of his lien upon the collateral and a judicial sale thereof. From a judgment in favor of respondent, this appeal is prosecuted.

Appellant contends that the assignment and release by respondent, being written instruments, cannot be varied by parol testimony, and that the two construed together show an absolute discharge of the debt which the collateral was given to secure, and if the debt is discharged, the collateral is thereby released. Where a written contract is ambiguous or obscure in its meaning, the surrounding circumstances may always be inquired into for the purpose of ascertaining what was within the contemplation of the parties and what the contract is. *Pennsylvania Mtg. Inv. Co. v. Simms,* 16 Wash. 243, 47 Pac. 441. But, in any event, a receipt or release is held not to be a contract or evidence of a contract, and may be explained or contradicted by parol evidence. *Allen v. Tacoma Mill Co.,* 18 Wash. 216, 51 Pac. 372.

The trial court, apparently having these principles in mind, received evidence of all the surrounding circumstances, and of various conversations and interviews, in which it is claimed appellant, after the as-

signment, recognized respondent's right to the collateral. But in our view of the case, this evidence is largely immaterial. If respondent be held to be a party to the assignment and bound by its terms, then what is the meaning of the clause providing that an acceptance of benefits shall be a full release? Clearly it is not intended that all debts shall be discharged by the execution of the assignment, as that result is denied by the words "acceptance of benefits." And there can be no doubt that the debt exists for the purpose of participating in all dividends, and if the debt exists for that purpose, there being nothing in the assignment inconsistent therewith, it also exists for the purpose of exhausting all collateral pledged prior to and antedating the assignment. So accepting the rule that the terms of a written instrument cannot be varied by parol evidence, the fact that the deed of assignment does not by its terms, or by necessary implication, require the creditor to surrender his previously acquired collateral before participating in the benefits of the assignment, or at any other time, or at all, is fatal to appellant's cause. Nor does the release add anything to the terms of the assignment. There was no consideration for it except the assignment. It was executed only to comply with the terms of the assignment. It was not even delivered to appellant, but was filed with the assignee as showing acceptance of the assignment by respondent. In any event, it does not purport to be a surrender or release of the collateral, and no surrender of the collateral was ever made.

But if it be argued that, in the preamble of the assignment, the intention to avoid the previously given collateral is to be inferred from the recital: "Whereas said assignors desire to pay each of their creditors equally and ratably and without the intervention of

legal proceedings, and without any priority of any kind other than that provided by law," the answer is equally plain. This collateral was pledged at the time the loan was made, when the corporation debtor was a going concern, and there is no hint that either the corporation or Pickering was then insolvent. The transaction when made was legal and enforceable, whether measured by the bankruptcy act or the trust fund theory, and being valid when made, it became a priority which all laws recognize. Such a lawful priority, we think, is expressly recognized by the language of the assignment above quoted, and if not, it is such a priority as can only be waived or released by some act or acts showing a clear intention so to do.

Some contention is made that respondent, by receiving dividends upon the full amount of his claim before having exhausted his collateral, has thus been unlawfully preferred. But aside from the fact that respondent appears to have followed this course at the request of appellant, and that it was unquestionably an advantage to appellant that he do so, because thereby the claim against the collateral was reduced by $1,000, it also appears that the creditors, who alone might complain, were fully advised of respondent's collateral before any dividend was paid; that respondent then surrendered the deeds covering the corporate real estate, which had also been pledged, and the creditors acquiesced in the situation and took no steps to protect their rights. The attempt to intervene, long after the case was tried in the court below, was not timely.

Finding no error, the judgment appealed from is affirmed.

MAIN, C. J., MACKINTOSH, CHADWICK, and MITCHELL, JJ., concur.

[No. 15056. Department One. December 28, 1918.]

VAN BUG FISH COMPANY, *Appellant*, v. MARTIN HERSTROM, *Sheriff of Jefferson County, Respondent.*[1]

INTOXICATING LIQUORS (53) — SEARCHES AND SEIZURES — BOATS — STATUTES. A boat on which intoxicating liquors are found is not subject to seizure and forfeiture by a justice of the peace, under Rem. Code, § 6262-11, providing for the seizure and forfeiture by justices of the peace of all "implements, furniture and fixtures" used or kept for the illegal sale of intoxicating liquors; in view of Id., § 6262-5, providing that premises, buildings, vehicles or boats unlawfully used may be abated as nuisances by action to be brought in the superior court, and may be released upon bond.

Appeal from a judgment of the superior court for Jefferson county, Ralston, J., entered May 13, 1918, dismissing an action for an injunction, after a trial on the merits to the court. Reversed.

A. R. Coleman, for appellant.

Tom W. Holman, for respondent.

TOLMAN, J.—On February 22, 1918, the prosecuting attorney of Jefferson county filed with a justice of the peace a complaint, and procured the justice to issue a search warrant directing the sheriff to search the gas boat "George E" for intoxicating liquors alleged to be kept thereon by one Sam Bugge in violation of the provisions of the prohibition law. In the execution of this warrant, the sheriff seized the boat "George E," and made return, stating in effect that he found and seized seventy-two packets containing liquor which were on board the U. S. Patrol Boat "Arcata," taken from the gas boat "George E" on February 22, 1918, and also the gas boat "George E"

[1]Reported in 177 Pac. 334.

from which said intoxicating liquor was taken; and further certifying that the liquor was found in the possession of the captain of the "Arcata," and that the gas boat "George E" was found in the possession of Sam Bugge. An order was made by the justice fixing a time for the hearing on the sheriff's return, at which time appellant appeared by its attorney before the justice, filed a claim of ownership of the "George E" in writing, and moved to quash the proceedings on the ground that the justice had no jurisdiction to enter a judgment for the forfeiture and sale of said boat. The motion being denied, the justice proceeded to enter an order declaring the boat forfeited, and issued an execution directing the sheriff to sell the same. Proceeding under the execution, the sheriff was about to sell the boat, when appellant brought this action and procured a temporary order restraining the sale. After trial on the merits, the court below denied appellant's prayer for a permanent injunction and dismissed the action. Whereupon this appeal followed.

The sole question here presented and to be determined is whether the boat in question may be forfeited and sold under §§ 11 and 12 of the act (Laws of 1915, p. 2, ch. 2; Rem. Code, § 6262-1 *et seq.*). Section 11 provides:

"If, upon the sworn complaint of any person, it shall be made to appear to any judge of the superior court or justice of the peace that there is probable cause to believe that intoxicating liquor is being manufactured, sold, bartered, exchanged, given away, furnished or otherwise disposed of or kept in violation of the provisions of this act, such justice of the peace or judge shall, with or without the approval of the prosecuting attorney, issue a warrant directed to any peace officer in the county, commanding him to search the premises designated and described in such complaint and warrant, and to seize all intoxicating liquor

there found, together with the vessels in which it is contained, and all implements, furniture and fixtures used or kept for the illegal manufacture, sale, barter, exchange, giving away, furnishing or otherwise disposing of such liquor . . ." Id., § 6262-11.

And § 12 (Id., § 6262-12) provides for a hearing on the return of the warrant for the purpose of determining whether "any article so seized" was kept or used for the purpose of violating the act; that "any person claiming any interest in any of the articles seized may appear and be heard upon filing a written claim," and if no such claim be made or substantiated, a judgment of forfeiture shall be entered.

Were these the only provisions of the act touching the disposition of property used unlawfully, it might be held that, by the use of the words "implements, furniture and fixtures," the intention is shown to include all personal property used, as was this boat, in violating the law. But the act must be construed as a whole; and in § 5 (Id., § 6262-5) we find what appears to be a complete provision covering property of this kind. It is there provided:

"It shall be unlawful for any person owning, leasing, renting or occupying any premises, building, vehicle or boat to knowingly permit intoxicating liquor to be manufactured, sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this act, or to be kept with intent to sell, barter, exchange, give away, furnish or otherwise dispose of the same in violation of the provisions of this act thereon or therein; and all premises, buildings, vehicles and boats whereon and wherein intoxicating liquor is manufactured, sold, bartered, exchanged, given away, furnished or otherwise disposed of or kept with intent to sell, barter, exchange, give away, furnish or otherwise dispose of the same in violation of the provisions of this act are common nuisances, and may be abated as such, and upon convic-

tion of the owner, lessee, tenant or occupant of any premises, buildings, vehicle or boat of a violation of the provisions of this section, the court shall order that such nuisance be abated, and that such premises, building, vehicle or boat be closed until the owner, lessee, tenant or occupant thereof shall give bond with a sufficient surety to be approved by the court making the order, in the penal sum of one thousand dollars, payable to the state of Washington, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, exchanged, given away, furnished or otherwise disposed of thereon and therein, or kept thereon or therein, with intent to sell, barter, exchange, give away or otherwise dispose of the same contrary to law, and that he will pay all fines, costs and damages that may be assessed against him for any violation of this act; and in case of the violation of any condition of such bond, the whole amount may be recovered as a penalty, for the use of the county wherein the premises are situated; and in all cases where any person has been convicted before a justice of the peace of a violation of the provisions of this section, and no appeal has been taken from such conviction, an information or complaint may be filed in the superior court of the county in which such conviction was had to abate the nuisance, and in any such action, a certified copy of the records of such justice of the peace, showing such conviction, shall be competent evidence of the existence of such nuisance."

It seems clear and plain from the mere reading of the act that the kind of property to be summarily dealt with under §§ 11 and 12 is the liquor itself, and the articles necessarily and customarily used in connection therewith and the sale and consumption thereof, such as the containers, glassware, bar furniture and fixtures, and the like. It is equally clear that boats and vehicles, being expressly named in § 5 (Id., § 6262-5), are to be disposed of under the terms of that section, and not otherwise. It may be that a boat is an implement, within the ordinary definition,

and were the provisions of § 5 omitted from the act, we might so define it. But we cannot believe that the framers of the act, after having provided that a boat or vehicle so used shall be deemed a nuisance and be abated as such, intended again to cover the same subject by the use of the words "implements, furniture and fixtures," as used in §§ 11 and 12 (Id., §§ 6262-11, 6262-12), and thus to provide a wholly different manner for the disposition thereof, inconsistent with the previous provisions already incorporated in § 5 (Id., § 6262-5). This court appears to have already adopted this view. *Everett v. McCullough,* 102 Wash. 51, 172 Pac. 863.

It will be observed that, under § 5, no jurisdiction is conferred on a justice of the peace, and that information or complaint seeking the enforcement of the provisions of that section must be filed in the superior court. It follows, therefore, that the justice of the peace, in the proceeding hereinbefore referred to, had no jurisdiction of the boat now in controversy; that his judgment of forfeiture was absolutely void, and therefore can be attacked collaterally; and the permanent injunction should have been issued as prayed for.

The judgment appealed from is reversed, with instructions to proceed as herein indicated.

MAIN, C. J., MACKINTOSH, CHADWICK, and MITCHELL, JJ., concur.

[No. 15000. Department Two. December 31, 1918.]

STATE BANK OF BLACK DIAMOND, *Respondent*, v. H. JOHNSON *et al.*, *Appellants*.[1]

SALES (179-1)—CONDITIONAL SALES—ASSIGNMENT OF CONTRACT—EFFECT. The vendor in a conditional sales contract reserving the title until the contract price was fully paid, may sell and transfer its title, and the intention to do so is manifested by a written indorsement on the bill of sale transferring all the vendor's right, title and interest in and to the within note and conditional bill of sale.

SAME (179-1, 182) — ASSIGNMENT OF CONTRACT — REMEDIES OF SELLER—ELECTION. Where a conditional sales contract retaining title in the vendor embodied a promissory note for the balance due, all as part of one instrument, an assignment of the conditional bill of sale and note guaranteeing its payment and fulfillment, merely renders the assignor liable as a guarantor should the assignee elect to seek recovery of the balance of the debt, and does not constitute an election that would vest title to the article sold in the conditional sales vendee.

SAME. After assignment of a conditional sales contract of an automobile, surrender by the vendee to the vendor with notice of the assignment, vests no title in the vendor, who can convey no title to an innocent purchaser, regardless of the fact that there was no constructive notice of the assignment under the recording laws; since the buyer acquires no title where the seller had none.

SAME (96-99)—RIGHTS OF BUYERS AS TO THIRD PERSONS—TITLE—INNOCENT PURCHASERS. Since the doctrine of sale in market overt does not obtain in this country, a buyer of an automobile from a dealer in possession acquires no rights as an innocent purchaser from one in possession with apparent title, where the dealer had previously sold it under a conditional sales contract reserving title, and had assigned the contract of sale with all title to the property, and the conditional sales vendee surrendered the automobile to the vendor.

Appeal from a judgment of the superior court for King county, Hall, J., entered April 12, 1918, upon findings in favor of the plaintiff, in an action of replevin, tried to the court. Affirmed.

[1]Reported in 177 Pac. 340.

Kerr & McCord, for appellants.

Karr & Gregory and *H. G. Sutton,* for respondent.

PARKER, J.—This is a replevin action wherein the plaintiff bank seeks recovery of an automobile, claiming title to the same by virtue of a conditional sale contract therefor, executed by Grant-Coffin-Campbell Company, as vendor, an assignment of all the rights of that company under the conditional sale contract, and forfeiture of the vendee's rights thereunder. The defendants, Johnson and Dahl, claim lawful possession and title to the automobile as innocent purchasers for value. Trial in the superior court for King county, sitting without a jury, resulted in findings and judgment in favor of the plaintiff, from which the defendants have appealed to this court.

On September 17, 1917, Grant-Coffin-Campbell Company, then being the owner and in possession of the automobile, entered into a conditional sale contract with A. L. Skonnord, looking to the transfer of the title to the automobile to Skonnord, which contract, in so far as we need notice its terms, reads as follows:

"Know All Men by These Presents:

"That Grant-Coffin-Campbell Co., a corporation, of Seattle, Wash., the vendor, on the seventeenth day of September, 1917, delivered to A. L. Skonnord, residing at Seattle, in King county, state of Washington, the vendee, personal property, described as:

"One Grant Six, Model 'K,' Touring Car No. 23494, engine No. 1813, with full equipment thereon, under contract of conditional sale on these terms and conditions at the price of $887.50.

"Said property is and shall remain the absolute property of the vendor, or its assigns, until the full payment of the purchase price or of any judgment therefor. . . .

"The vendee has paid to the vendor on account of the purchase price the sum of $287.50, and the balance,

to wit; $600 is evidenced by the following promissory note, which is accepted as additional evidence of indebtedness and not as payment, viz.:

"Seattle, Wash., Sept. 17, 1917.

"For value received, I promise to pay to Grant-Coffin,Campbell Co. or order, Six Hundred . . . Dollars, in gold coin of the United States of America, with interest thereon in like gold coin at the rate of eight per cent per annum from date until paid, payable in twelve installments of not less than $50 in any one payment, together with the full amount of interest due on this note at the time of payment of each installment. The first payment to be made on the 17th day of October, 1917, and a like payment on the 17th day of each month thereafter, until the whole sum, principal and interest, has been paid, if any of said installments are not so paid, the whole sum of both principal and interest to become immediately due and collectible at the option of the holder hereof. . . .

A. L. Skonnord."

"The vendor may at any time sell or assign its interest in the property, including said note and insurance, to any person, and such transferee shall have the same rights hereunder as the vendor.

"Time is of the essence of this contract. If the vendee shall make default in the payment of said note, or any installment thereof, principal or interest, as and when the same shall become due . . . or sell or attempt to sell, or encumber, said property . . . it shall be optional with the vendor to (1) declare this contract forfeited and determined and take possession of said property with or without process of law, and retain all sums paid by the vendee, as and for rent, for the use of said property, or (2) to declare the whole unpaid sum of said note, with interest immediately due and collectible. . . .

"A. L. Skonnord, Vendee.

"Grant-Coffin-Campbell Co.

"By Edw. P. Campbell, Pres., Vendor.

On the date of the execution of the conditional sale contract, the rights of Grant-Coffin-Campbell Com-

pany thereunder were duly assigned by it to respondent bank by indorsement on the back thereof, as follows:

"For value received I hereby sell, assign and transfer to State Bank of Black Diamond all my right, title and interest in and to the within note and memorandum of conditional bill of sale, and I hereby guarantee the payment and fulfillment of the within contract at the time and in the manner therein stated. . . .

"Grant-Coffin-Campbell Co.
"By Edw. P. Campbell, Pres."

This assignment was made in consummation of an outright sale to the bank of all the rights of Grant-Coffin-Campbell Company under the contract, and not as collateral or security. Thereafter, on the day following, the conditional sale contract, with the assignment so indorsed thereon, was filed in the office of the auditor of King county, as it is claimed, in pursuance of the provisions of §§ 3670, 3671, Rem. Code. A few days after, October 17, 1917, the date on which the first deferred installment of the purchase price under the conditional sale contract became due, Skonnord, being unable or unwilling to pay any portion of the balance of the purchase price, returned the automobile to Grant-Coffin-Campbell Company. Thereafter, on October 25, 1917, appellants, Johnson and Dahl, entered into a contract with Grant-Coffin-Campbell Company for the purchase of a second-hand automobile of the same general description as that described in the conditional sale contract, although not specifically describing that automobile, for an agreed price of $600, paying $20 down thereon. On the following day, Edw. P. Campbell, of Grant-Coffin-Campbell Company delivered the automobile mentioned in the conditional sale contract and which had been returned to Grant-Coffin-Campbell Company, evidently in compliance

with the contract made between that company and Johnson and Dahl the day previous, executing a bill of sale therefor to Johnson and Dahl in the name of "Campbell Motor Car Company, by Edw. P. Campbell, President." Johnson and Dahl then paid to Campbell the balance of the $600 agreed purchase price. It appears that there was no such corporation or concern as the "Campbell Motor Car Company."

On about November 1, 1917, Mr. Karr, attorney for the bank, called Campbell's attention to the fact that Skonnord had failed to pay the $50 installment falling due under the conditional sale contract on October 17, 1917. Thereupon Campbell informed Karr that he, Campbell, had promised Skonnord that he would take care of the payment for Skonnord. Whereupon Campbell then paid to Karr, for respondent, the sum of $106, being the installments and interest falling due October 17 and November 17, 1917. Thereafter, about December 1, 1917, the officers of the bank learned for the first time that the automobile had been returned by Skonnord to Grant-Coffin-Campbell Company, and that Campbell had assumed to sell and dispose of it to someone. As soon thereafter as the officers of the bank were able to discover that Johnson and Dahl were the persons to whom Campbell had assumed to sell and deliver the automobile, they immediately notified Johnson and Dahl that the bank was the owner of the automobile under the conditional sale contract and the assignment thereof and demanded possession of the automobile from them. They refused to deliver possession of the automobile to the bank, and also refused to pay the installment maturing December 17, 1917, then past due, under the provisions of the conditional sale contract. Thereafter, on December 19, 1917, this action was commenced by the bank, seeking recovery of the automobile. Upon the filing of the conditional

sale contract in the office of the county auditor of King county, it was duly indexed, both direct and inverted, as to grantor and grantee, that is, as to Grant-Coffin-Campbell Company and Skonnord, and in connection therewith, at each of the two places so indexed, a notation was made in red ink as follows: "Assigned to the State Bank of Black Diamond." The facts so far related by us are either admitted or appear in the record uncontroverted. The trial court found, however, touching the question of the knowledge of Johnson and Dahl of the bank's claim of title to the automobile, as follows:

"That the defendants herein, and each of them, prior to taking possession of said automobile or paying any money therefor, either knew, or could by the exercise of reasonable diligence have known, that the plaintiff herein was the owner of said automobile under and by virtue of the said memorandum of conditional sale, and that they were not bona fide purchasers thereof without notice."

It is first contended by appellants, Johnson and Dahl, that respondent bank did not acquire the legal title to the automobile by the assignment of the interest of Grant-Coffin-Campbell Company in the note and conditional sale contract; and that the assignment became, in effect, an election on the part of both parties thereto to vest title to the automobile in Skonnord and thereafter to look to him only as a debtor owing the balance of the purchase price therefor. It seems plain that, since the legal title to the automobile remained in Grant-Coffin-Campbell Company by the express terms of the conditional sale contract, there was no legal impediment to that company transferring its title to the automobile to the bank, subject, of course, to Skonnord's right to perfect his title by the payment of the balance due upon the purchase

price as against the bank, as well as against Grant-Coffin-Campbell Company. So it becomes a question of the intention of Grant-Coffin-Campbell Company and the bank to be gathered from the terms of the assignment. We have seen that the assignment transferred to the bank all "right, title and interest" of Grant-Coffin-Campbell Company "in and to the within note and memorandum of conditional bill of sale." Now, that company possessed, under the conditional sale contract, two alternative rights: (1) The right to retake the automobile upon the failure of Skonnord to comply with the terms of the conditional sale contract; and (2) the right to look to Skonnord as a debtor owing the balance of the purchase price. We are quite unable to view the language of this assignment other than as evidencing an intent on the part of both Grant-Coffin-Campbell Company and the bank to transfer to the bank both of these alternative rights, either of which the bank could elect to claim, as Grant-Coffin-Campbell Company could have done had no assignment been made. It is true the assignment guaranteed "the payment and fulfillment of the within contract," but these words, as we view them, had no other effect than to render Grant-Coffin-Campbell Company liable as a guarantor, not only for the payment of the balance due upon the purchase price, should the bank elect to seek recovery of such balance as a debt, but also as a guarantor of the return of the automobile, should the bank elect to claim that right upon the failure of Skonnord to pay the balance of the purchase price.

Counsel rely principally upon our decisions in *Winton Motor Carriage Co. v. Broadway Automobile Co.*, 65 Wash. 650, 118 Pac. 817, 37 L. R. A. (N. S.) 71, in support of their contention that there was, by the assignment, an election on the part of both parties

thereto to look to Skonnord as a debtor only and to vest title to the automobile in him. In that case, however, there was involved an assignment, by indorsement, of a simple promissory note given by the vendee to the vendor to evidence the purchase price of a conditional sale contract. The note was an entirely separate instrument from the contract of sale. It did not, upon its face, make any reference to the contract, nor did the contract make any reference to the note. The transfer of the note was only a transfer of the right to look to the vendee as a debtor. This, we held, constituted an election to vest title to the property in the vendee and thereafter to look to him only as a debtor. Had the note and conditional sale contract there involved been embodied in one instrument and all the rights thereunder assigned, as in this case, we think the conclusion reached in that case would have been different. In *Barbour v. Hodge,* 99 Wash. 578, 170 Pac. 115, observations were made in harmony with this view, though the question was but very briefly noticed therein. In the following decisions, each involving the assignment of a promissory note and conditional sale contract embodied in one writing, similar to the one here involved, it was held that the assignment of such note and contract and of the interest of the assignor thereunder, though the assignment did not in terms refer to the property, effected a transfer of the reserved legal title to the assignee. *Myres v. Yaple,* 60 Mich. 339, 27 N. W. 536; *Barton v. Groseclose,* 11 Idaho 227, 81 Pac. 623; *Lazarovitch v. Tatilbum,* 103 Me. 285, 69 Atl. 275; *Bank of Little Rock v. Collins,* 66 Ark. 240, 50 S. W. 694.

We are quite convinced that the assignment by Grant-Coffin-Campbell Company of all its "title and interest in and to" the note and conditional sale con-

tract vested the reserved title to the automobile in the bank.

It is further contended by counsel for Johnson and Dahl that they are, in any event, innocent purchasers of the automobile for value, from one having possession and apparent title thereto, and that they should now be protected as against the claim of the bank. It is argued that the filing of the conditional sale contract and assignment indorsed thereon in the auditor's office did not give to Johnson and Dahl any constructive notice of the bank's title to the automobile, nor even of the title of Grant-Coffin-Campbell Company prior to the execution of the assignment; and also that they had no actual knowledge of any facts putting them upon inquiry or requiring them to take notice of the bank's title to the automobile, nor the claim of title of any one thereto other than Grant-Coffin-Campbell Company, the Campbell Motor Car Company or Edward P. Campbell, from one or the other of whom it may be said they purchased the automobile. It may well be argued that Johnson and Dahl had no constructive notice under the filing and recording provisions of our conditional sale contract statute, Rem. Code, §§ 3670, 3671, since that statute makes no provision for the filing, recording or indexing of assignments of this nature, and it is not claimed that the assignment was recorded or indexed as a bill of sale under Rem. Code, § 5291. It may also well be argued that, since neither Grant-Coffin-Campbell Company, Campbell Motor Car Company, nor Edward P. Campbell were holding the automobile as a vendee under a conditional sale contract, there was no occasion for Johnson and Dahl to look to the files or index of conditional sale contracts to learn what interest of that nature might be claimed by either of those parties. Our decisions in: *Howard v. Shaw,* 10 Wash.

151, 38 Pac. 746; *Fischer v. Woodruff*, 25 Wash. 67, 64 Pac. 923, 87 Am. St. 742; *Dial v. Inland Logging Co.*, 52 Wash. 81, 100 Pac. 157, might be cited in support of such argument. However, we shall assume, rather than here decide, that Johnson and Dahl had no constructive notice, under the recording provisions of our conditional sale contract statutes, of any claim of title on the part of the bank.

The finding of the trial court, above quoted, that Johnson and Dahl knew, or could by the exercise of reasonable diligence have known, of the bank's claim of title when they purchased the automobile, which finding, we assume, relates to notice apart from constructive notice under the recording provisions of the statute, is challenged by counsel for Johnson and Dahl as not being supported by the evidence. A review of the evidence leaves us in considerable doubt as to the correctness of this finding. However, let us concede that Johnson and Dahl had no such knowledge as would put them upon inquiry leading to their discovering the bank's claim of title, in what position do we find them? Simply this, they purchased the automobile from one who had no title whatever therein. They acquired no more title or interest in the automobile when they purchased it from Grant-Coffin-Campbell Company, Campbell Motor Car Company, or Edward P. Campbell than as if they had purchased it from one who had stolen it; in which event, of course, they would have acquired no title whatever as against that real owner.

Some contention is made rested upon the fact that Grant-Coffin-Campbell Company was a corporation engaged principally in the sale of automobiles, and that the automobile was purchased by Johnson and Dahl at its place of business, it being then in posses-

sion and the apparent owner of the automobile. It is true that possession of personal property is some evidence of title thereto by the one in possession of it; but, in order to sustain Johnson and Dahl's claim of title in this case, it would be necessary to go to the extent in invoking in their favor the doctrine that a sale in *market overt* vests good title in the vendee though the vendor had no title, applicable under certain conditions in England, but not recognized as the law in this country. 35 Cyc. 358; 2 Bouvier's Law Dictionary (Rawle's 3d Revision), 2095. If the vendor has no title, the vendee acquires none; unless the one having title has by act or neglect estopped himself from disputing the vendee's claim of title so acquired. It seems plain there is no such estoppel here.

Some contention is made in behalf of Johnson and Dahl rested upon the theory that Skonnord returned the automobile to Grant-Coffin-Campbell Company in satisfaction of all claims against him under the conditional sale contract, resulting in the title to the automobile remaining in that company by agreement between it and him at a time when he had no notice that the rights of Grant-Coffin-Campbell Company under the conditional sale contract had been assigned to the bank. The record convinces us that, when Skonnord returned the automobile to Grant-Coffin-Campbell Company he was advised that the note and conditional sale contract had been assigned by that company to the bank. One of the express terms of the conditional sale contract is that "The vendor may at any time sell or assign its interest in the property . . . to any person and such transferee shall have the same rights hereunder as the vendor." This plainly suggested the possibility of an assignment, and the evidence in the record tends strongly to show that, when

the automobile was returned by Skonnord, Campbell then promised him to pay the balance due upon the contract to the bank, to the end that he, Skonnord, might be relieved from further obligation under the contract. But even if the facts were as claimed by counsel for Johnson and Dahl touching the question of Skonnord's want of notice of the assignment, the fact still remains that neither Grant-Coffin-Campbell Company, Campbell Motor Car Company, nor Edward P. Campbell had any right, title or interest whatever in the automobile at the time one or the other of them assumed to sell it to Johnson and Dahl. Whatever view may be taken of any branch of this case, other than of the question of the bank acquiring title to the automobile by assignment of the conditional sale contract, there remains the fact that Johnson and Dahl's vendor had no title to convey, and the want of estoppel preventing the bank from asserting its title to the automobile.

The judgment is affirmed.

MAIN, C. J., MOUNT, FULLERTON, and HOLCOMB, JJ., concur.

[No. 14676. *En Banc.* January 2, 1919.]

MOLLIE JOHNSTON, *nee Mollie Thuneman, Appellant,* v. SPOKANE & INLAND EMPIRE RAILROAD COMPANY *et al., Respondents.*[1]

LIMITATION OF ACTIONS (56-58) — DISCOVERY OF FRAUD — LACHES. An action for the rescission of the sale of corporate debentures or certificates, misrepresented to be preferred stock, is barred by laches and the statute of limitations, Rem. Code, § 159, subd. 4, limiting actions for relief on the ground of fraud to three years after discovery of the fraud, where the purchase was made in 1907 and action was not commenced until 1915, the certificate on its face recited that it was for "Preferred Rights" issued under a certain by-law referred to and made a part of it, and was neither capital stock nor an incumbrance on real estate and the purchaser was a woman of experience and a skillful investor who could not have been misled and could not have misunderstood the contents of the instrument upon a casual reading of it.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered October 25, 1916, in favor of the defendants, in an action for rescission, tried to the court. Affirmed.

John B. Johnston, George W. Belt, A. E. Barnes, Cyrus Happy, and *Happy & Happy,* for appellant.

Graves, Kizer & Graves, for respondents.

HOLCOMB, J.—Respondent Spokane & Inland Empire Railroad Company is a domestic corporation organized for the purpose of building and maintaining an electric interurban railway system and for other purposes in the states of Washington, Idaho, and Oregon. It took over the properties of several existing companies and organized with $10,000,000 capital stock, all of which had been subscribed to the limit of its capitalization. The promoters wanted an additional stock issue or a security which could be sold in

[1]Reported in 177 Pac. 810.

the market in addition to the bonds, but did not want a preferred stock, which they were advised was unauthorized by our local laws, or which could be voted as other stock; and they wanted a stock or security which could be retired at pleasure. After a great deal of legal consultation, the articles of incorporation and the by-laws were amended, the by-laws so as to change preferred stock to preferred certificates; and, upon further objection, the by-laws were finally, on October 25, 1906, amended to change preferred certificates to "preferred rights."

Thereafter over six million dollars' worth of "preferred rights" were issued and sold in the market, at home and abroad. Respondent Grinnell and family have been acquainted with, and intimate friends of, appellant for twenty-seven years, and through his corporation he had represented the appellant in numerous profitable business ventures. Appellant had the utmost confidence in Grinnell and was willing to believe, and did believe, that any business venture which he would offer or recommend would be safe and profitable. On July 13, 1907, Grinnell wrote the appellant the following letter:

"Spokane, Wash., July 13-07.

"Miss Mollie Thuneman,

"Sullivan, Illinois.

"Dear Mollie: Referring again to your letter of July 7th, will say that I would advise you to invest the $2,000 you sent me, which you say is your father's, in the preferred stock of the Spokane & Inland Empire Railroad Company. This stock can be had at $90, pays 5 per cent dividend and 1¼ per cent annually, which is practically 6 per cent interest. The company has the right to redeem this stock by paying $135 for it, and will probably do so in a few years. I would also advise you to put about $2,000 into the common stock, which does not pay a dividend at the present

time, and the earnings of the road are coming up so fast that I anticipate within a year, or a year and a half, this stock will go to par. I have recently put some $50,000 of my own funds into this stock, and I believe my judgment is sound on the proposition. I believe the common stock of the Spokane & Inland for a speculation is better at any time than any real estate investment you can go into.

"Consider this matter carefully, and write me about it, and if you decide you do not care to go into it, I will loan out the $2,000 for you on a real estate mortgage, but it will have to be loaned for three or five years. I can get commercial paper here payable in 90 days at about 6 per cent.

"With kind personal regards, I am

"Yours very respectfully,

"(Signed) Fred B. Grinnell."

In response to this letter, appellant directed Grinnell to invest in the stock or rights involved here. She asserts that she thought she was buying *preferred stock* of the Spokane & Inland Empire Railroad Company as represented by Grinnell's letter, and did not inquire further into the matter, but deposited the paper as collateral security for the loan from her father in Sullivan, Illinois, where she had received the paper by mail from Grinnell. The document had the appearance to her of a stock certificate with the word "Preferred" printed across the face of it in large red letters, and is as follows:

Certificate for less than 100 rights

G 84 Rights 22

Certificate for less than 100 rights.

Spokane and Inland Empire Railroad Company

Incorporated under the laws of the State of Washington.

This certifies that Mollie Thuneman is the owner of twenty-two preferred rights of the Spokane and Inland Empire Railroad Company of the par value of one hundred dollars ($100) each, transferable only on the books of said company by the owner in person, or by duly authorized attorney, upon the surrender hereof properly indorsed. Said preferred rights are part of an issue of $10,000,000 par value, issued and to be issued under the authorizat'on and subject to the provisions of section 6, article one of the by-laws of the company as the same were amended on October 25th, 1906, reference to which section is hereby made with the same force and effect as if the same were incorporated herein. The holder of this certificate by acceptance thereof hereby agrees to the terms and conditions of said section, and any amendments thereto made as therein provided, and to any step or action hereafter taken or done in accordance with said section, or any such amendment thereto.

Registered August 3rd, 1907 Northwest Loan & Trust Company By Adolph Galland, Registrar.

Countersigned Aug. 2nd, 1907 Union Trust Company of Spokane Transfer Agent by James C. Cunningham, Secretary.

The preferred rights represented by this certificate and this certificate are redeemable at any time at the option of the company by the payment of $135 for each $100 of said preferred rights and all accrued and unpaid dividends thereon. This certificate is not valid until countersigned by the Registrar.

Witness the seal of the company and the signature of its duly authorized officers this 2nd day of August, 1907.

This certificate is transferable either in New York City or Spokane, Washington.

(L S) W. C. Davidson, Secretary.
Jay P. Graves, President.

Rights $100 each.

After the purchase, receipt and hypothecation of this instrument at Sullivan, Illinois, appellant came to Spokane and spent about six weeks there in the fall of 1907. She married in 1909 and went to live in Everett, Washington. Her husband is a lawyer, and was in Spokane in 1910 and at several subsequent times attending to her business interests.

Two quarterly dividends were sent to appellant in 1908, but none thereafter, although she inquired of Grinnell for the subsequent dividends and was informed by him that the dividends were cumulative. In August, 1909, Grinnell wrote her in Illinois telling her of a big wreck, known as the Gibbs wreck, on the company's line, and that, because of it, he could not tell when the company would resume payment of dividends on the "preferred stock." Apparently in reply to that letter, she wrote him from Illinois that he need not be worried on her account because the railroad company was not paying a dividend; that no reasonable person could expect every venture to be a success, and that if she lost the money she would not worry over it; that she had always believed in the enterprise and still did believe in it.

Supposing that the dividends were cumulative, she did not further concern herself about them until about 1910-11, when she again inquired about the nonpayment of dividends, and Grinnell informed her that, on account of the Gibbs wreck and the Palouse floods washing out portions of the company's lines, the company was still in such condition that it could not pay dividends. In the early part of 1915, appellant again inquired of Grinnell about the condition of her stock or security, which inquiry was ignored. She took up the matter with the railroad company and the public service commission, but failing to get satisfaction and

being informed by the company that she had not purchased "preferred stock," she sent to Sullivan, Illinois, for the certificate. Within two months after the railroad company informed her that it had not sold her preferred stock, appellant commenced her action, praying that her alleged contract of purchase of "preferred rights" be rescinded and that she have and recover from defendants, and each of them, the sum of $1,980, with interest from August 2, 1912. Respondents pleaded two affirmative defenses; the statute of limitations, and laches.

Appellant claims the right to rescind the contract of sale and recover the money she paid for the preferred rights on the ground that the company was without power to issue the preferred rights, and that there was misrepresentation by Grinnell, its agent, in making the sale. There is an elaborate discussion by counsel for both sides upon the question of whether the company was without power to issue the preferred rights, so called, and whether the issue was, therefore, *ultra vires*.

Disregarding the discussion as to whether the transaction was *ultra vires*, we shall pass at once to consider the questions of the statute of limitations and laches, which we consider determinative of appellant's rights in this action. The transaction having been consummated in 1907 and the suit having been commenced in 1915, it is contended by appellant that she had no knowledge, and no means of knowledge, of the deception and fraud upon her until within a few months before she commenced the suit, and that she was lulled into a feeling of trust and reliance by Grinnell until she was finally informed by the company in 1915 that she had not purchased preferred stock at all.

Rem. Code, § 156, and § 159, subd. 4, are as follows:

"The period prescribed in the preceding section for the commencement of actions shall be as follows: . . .

"(§ 159) Within three years, . . .

"An action for relief upon the ground of fraud, the cause of such action not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud; . . ."

Whatever was the exact nature of the instrument purchased by appellant—and it possibly falls within the cloudy category of undefinable corporate instruments called debentures (1 Bouvier, 3d ed., p. 84)—it was received by appellant, who was a woman of mature years, a shrewd and skillful investor, well educated, had taught school in Spokane for fifteen years, and was manifestly able to read and understand the terms and provisions of the instrument. It is inconceivable that, upon her receipt of the instrument at Sullivan, Illinois, she hypothecated it at once for a loan without understanding its contents. It was plainly headed, "Certificate for preferred rights; Rights 22," and began the statement of its provisions with the certificate that she "is the owner of 22 preferred rights of the Spokane & Inland Empire Railroad Company," etc. The terms then provided how the rights should be transferred; that they were part of an issue of $10,000,000, par value, issued and to be issued under the authorization, and subject to the provisions, of a certain article and section of the by-laws of the company as amended on October 25, 1906, and that a reference to those by-laws "is hereby made with the same force and effect as if same were incorporated herein." The certificate further provided that the holder of it, by acceptance thereof, agrees to the terms and conditions of the section of by-laws referred to and any amendment thereto made as therein provided,

and to any step or action thereafter taken or done in accordance therewith, or any such amendment thereto. It plainly provided that the preferred rights represented by the certificate were redeemable at the option of the company by the payment of $135 for each $100 of such preferred rights. The instrument bore upon its face, in red ink in large type, the word "Preferred." The by-laws referred to in the instrument and by Grinnell in his letters to appellant provided for the payment of dividends and one and one-fourth per cent interest quarterly, subject to the ability of the company to pay.

It would be impossible for a person of ordinary intelligence, much less a person of the intelligence and ability of appellant, to have misunderstood the contents of this instrument upon a casual reading thereof, and certainly she could not have been misled by any statement to her by Grinnell that the issue was of preferred stock. Even had it been of preferred stock, its value might have been no better, and possibly less, than this. This instrument, while it was neither capital stock nor an incumbrance upon the property, was undoubtedly an instrument acknowledging indebtedness and agreeing to pay dividends and interest for the money received and a considerable bonus in addition thereto. But it is immaterial what it was precisely, for, having it and knowing its contents, and being required by the terms thereof to refer to the by-laws of the company for further information as to its obligation, she could not claim that she had been deceived by misrepresentations on the part of Grinnell, even conceding him to be the agent only of the company in the transaction.

We have always held that a party whose rights rest upon a written instrument which is plain and unambiguous, and who has read or had the opportunity to

read the instrument, cannot claim to have been misled concerning its contents or to be ignorant of what is provided therein. *Sherman v. Sweeny,* 29 Wash. 321, 69 Pac. 1117; *Hubenthal v. Spokane & Inland R. Co.,* 43 Wash. 677, 86 Pac. 955; *Golle v. State Bank of Wilson Creek,* 52 Wash. 437, 100 Pac. 984. And that,

" 'Whatever is notice enough to excite attention and put the party on guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.' . . . 'The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it'." *Deering v. Holcomb,* 26 Wash. 588, 67 Pac. 240, 561.

A party defrauded must be diligent in making inquiry. The means of knowledge are equivalent to knowledge. A clew to the fact which, if followed up diligently, would lead to discovery, is in law equivalent to a discovery. *Norris v. Haggin,* 28 Fed. 275; *Irwin v. Holbrook,* 32 Wash. 349, 73 Pac. 360; *Kline v. Galland,* 53 Wash. 504, 102 Pac. 440; *Uhlbright v. Mulcahy,* 78 Wash. 9, 138 Pac. 314.

"A party seeking to rescind for fraud or false representations must do so within a reasonable time, and the right is lost by failure to act promptly on discovery of the fraud, or after it might have been discovered by the use of due diligence." 13 C. J. 616.

See, also, *Thomas v. McCue,* 19 Wash. 287, 53 Pac. 161.

And mere silence is not sufficient concealment of fraud to interfere with the running of the statute of limitations where the facts are readily ascertainable. There must be some hindrance or impediment interposed, or some fraudulent concealment by the defend-

ant, to have that effect. *Sackman v. Campbell,* 15 Wash. 57, 45 Pac. 495; *Kline v. Galland, supra.*

We are therefore convinced that appellant's action is barred both by her own laches and by the statute of limitations.

Judgment affirmed.

MAIN, C. J., PARKER, MACKINTOSH, MITCHELL, FULLERTON, MOUNT, and TOLMAN, JJ., concur.

[No. 14874. Department Two. January 2, 1919.]

FAWKNER, CURRIE & COMPANY, INCORPORATED, *Appellant,* v. RIO NEGRO SHIPPING COMPANY *et al., Respondents.*[1]

BROKERS (16, 20, 33)—COMMISSIONS—PROCURING CAUSE—EVIDENCE—SUFFICIENCY. The evidence supports findings that a broker failed to earn commissions for the sale of a ship, where the preponderance is to the effect that after his purchaser had refused to complete the purchase at $13,000, and negotiations had been broken off, the captain employed another broker who effected a sale to the same purchaser obtaining a price of $15,000 and paying the other broker a $2,000 commission (HOLCOMB, J., dissenting).

Appeal from a judgment of the superior court for King county, Jurey, J., entered January 11, 1918, upon findings in favor of the defendants, in an action on contract, tried to the court. Affirmed.

Dudley G. Wooten, for appellant.

John A. Soule and *Edward Judd,* for respondents.

MOUNT, J.—This action was brought to recover a commission of $650 for the sale of a ship. The complaint alleges in substance that, on or about January,

[1]Reported in 177 Pac. 339.

1917, the defendant company entered into a contract with the plaintiff as selling broker, by which defendant agreed to pay five per cent commission on the sale price of the ship "Fortuna," owned by the defendant. That plaintiff performed its part of the contract, sold the ship, which was at the time in Pimentel, Peru, for the agreed price of $13,000, and thereby earned its commission. The defendant denied generally the allegations of the complaint. On these issues, the case was tried to the court without a jury. At the conclusion of the evidence, the court found, in substance, that the plaintiff did not sell the ship; that it was sold by the captain for the sum of $15,000; that a broker employed by the captain to make the sale was paid a commission of $2,000; and that the sale by the captain was an independent sale, after negotiations which had been entered into between the plaintiff and Comyn, Mackall & Company, of Peru, had been broken off. Upon these findings, the court entered a judgment in favor of the defendants. The plaintiff has appealed.

The correctness of this judgment depends entirely upon a question of fact. It is argued by counsel for appellant that the evidence shows appellant was the moving cause of the sale and is therefore entitled to a commission. The trial court found that the appellant was not the moving cause of the sale; that the sale was not made by or through appellant, but was finally made after the purchaser which appellant had procured had refused to purchase the ship upon the terms offered, and that the captain of the vessel thereafter, upon instructions from the owners, made an independent sale of the vessel.

There are some circumstances in the case favorable to the appellant, but the weight of the evidence is to the effect that the appellant was authorized to sell the

vessel for $13,000, upon a contract contained in a letter from the owners to the appellant as follows:

"We will sell the American Schooner Fortuna . . . to Comyn, Mackall & Co., or any person designated by them, for $13,000 cash. Delivery to be made at Pimentel, Peru, after the discharge of the present cargo . . . Out of the price we will pay a selling commission of five per cent."

It appears that, at the time this letter was written by the respondents to appellant, the vessel was on her voyage from Seattle, in this state, to Pimentel, Peru. When the vessel arrived at Pimentel, Comyn, Mackall & Company, to whom the vessel was to be sold, sent a message to the owners in Seattle to the effect that they would not accept the vessel without a new mainmast and without some dories and the chronometer on the vessel. The owners refused to furnish these items. Thereafter Comyn, Mackall & Company notified the owners that they would not take the vessel. Thereafter the owners of the vessel sent a message to the captain asking him to sell the vessel or return her to her home port. The captain thereupon employed a broker to make the sale. This broker sold the vessel to the same person to whom Comyn, Mackall & Company were endeavoring to sell. The captain obtained a price of $15,000, and paid the broker who made the sale $2,000 commission. This is the substance of the evidence offered in behalf of respondents on the trial. The trial court apparently believed this evidence and concluded that the sale made by the captain through the broker whom he had secured was entirely independent of the sale which the owners had authorized the appellant to make, and, for that reason, found in favor of the respondents and entered judgment accordingly. We think there can be no doubt that the weight of the evidence was as found by the trial court.

There was clearly sufficient evidence to support the findings made.

The judgment must therefore be affirmed.

MAIN, C. J., PARKER, and FULLERTON, JJ., concur.

HOLCOMB, J. (dissenting)—Reluctantly, I am compelled to dissent from the foregoing decision, upon the facts.

To me, the facts preponderate in favor of appellant, and in such case it is our statutory duty not to be bound by the findings and judgment of the trial court.

There is no conflict that appellant found a purchaser upon the terms required by the seller. After the sale, and when the ship was about to be delivered to the purchaser, the purchaser made some untenable objection about the transfer of the flag, and also demanded the new mainmast, dories and chronometer. None of these objections were allowed to interfere with the final sale by the same owners to the same purchaser, for the owners had no difficulty in transferring the ship to the purchaser, and no new mainmast, dories and chronometer were furnished. The ship was sold and delivered to the same purchaser, upon the same terms and for the same price, as in the sale consummated by the appellant. These facts lead me to the inevitable conclusion that there was simply an attempt to avoid and evade the payment of appellant's earned commission, and go through the forms of a failure of compliance and a new sale. Judgment should have been for appellant.

[No. 14948. Department Two. January 2, 1919.]

GERTRUDE DAY, *Respondent*, v. GREAT EASTERN CASUALTY COMPANY, *Appellant*.[1]

INSURANCE (128, 185)—ACCIDENT INSURANCE—CAUSE OF DEATH—"EXTERNAL, VIOLENT AND ACCIDENTAL MEANS"—EVIDENCE—SUFFICIENCY. The death of insured, who had previously been in perfect health, is sufficiently shown to have been caused by "external, violent and accidental means" within the terms of an accident policy, rather than by diabetes or disease, where it appears that he was struck on the back and bruised, and the bruise developed a carbuncle and infection from which he died, notwithstanding that, after the accident, there were symptoms of diabetes which a physician gave as a direct or contributing cause, where diabetes was more probably caused by the injury than that death resulted from disease.

Appeal from a judgment of the superior court for King county, Hall, J., entered March 14, 1918, upon findings in favor of the plaintiff, in an action on an accident insurance policy, tried to the court. Affirmed.

F. E. Knowles, for appellant, contended, *inter alia*, where a person receives a small injury and dies, the disease of diabetes constitutes a defense under the policy, as the injury did not cause the death solely and independently of all causes, and death is not produced by external, violent and accidental means. *White v. Standard Life & Accident Ins. Co.*, 95 Minn. 77, 103 N. W. 735, 884; *National Masonic Acc. Ass'n of Des Moines v. Shryock*, 73 Fed. 774; *Continental Casualty Co. v. Peltier*, 104 Va. 222, 51 S. E. 209; *Anton v. Chicago, Milwaukee & St. Paul R. Co.*, 92 Wash. 305, 159 Pac. 115.

The affidavits of the physicians constitute the only evidence as to the cause of death (*Taylor v. Modern*

[1]Reported in 177 Pac. 650.

Woodmen of America, 42 Wash. 304, 84 Pac. 867; *Palmer v. Abraham,* 55 Wash. 352, 104 Pac. 648), and being uncontradicted, are binding admissions that the deceased died indirectly from the cause of diabetes. *Proppe v. Metropolitan Life Ins. Co.,* 13 Misc. Rep. 266, 34 N. Y. Supp. 172; *National Masonic Acc. Ass'n v. Shryock, supra; Nelson v. Nederland Life Ins. Co.,* 110 Iowa 600, 81 N. W. 807; *Dennis v. Union Mutual Life Ins. Co.,* 84 Cal. 570, 24 Pac. 120; *Schmitt v. National Life Ins. Co.,* 84 Hun 128, 32 N. Y. Supp. 513; *Aetna Life Ins. Co. v. Ward,* 140 U. S. 76.

The proximate cause of death then rests upon conjecture and speculation. *Parmelee v. Chicago, Milwaukee & St. Paul R. Co.,* 92 Wash. 185, 158 Pac. 977; *Weckter v. Great Northern R. Co.,* 54 Wash. 203, 102 Pac. 1053; *Price v. Occidental Life Ins. Co.,* 169 Cal. 800, 147 Pac. 1175; *Preferred Accident Ins. Co. v. Fielding,* 35 Colo. 19, 83 Pac. 1013; *McAuley v. Casualty Co. of America,* 39 Mont. 185, 102 Pac. 586.

Smith, Chester, Brown & Worthington, for respondent.

MOUNT, J.—This action was brought to recover against the defendant on an accident insurance policy for $600. On issues joined, the case was tried to the court without a jury, and resulted in a judgment in favor of the plaintiff for the amount sued for. The defendant has appealed.

On June 12, 1916, appellant issued to Henry H. Day a policy of accident insurance

"against the effects of bodily injuries caused directly, solely and independently of all other causes by external, violent and accidental means which shall not be caused wholly or directly or in any part directly by any disease, defect or infirmity, and which shall from the date of the accident result in continuous disability

or which shall result in the death of the insured under the above conditions,"

then the policy rendered the appellant liable for $600.

The plaintiff was the beneficiary named in the policy. On August 5, 1916, while the policy was in effect, the insured, who was a section foreman in the employ of the Northern Pacific Railway Company, while attempting to get upon a moving hand-car, was struck on the small of the back by the handle of the moving car. The accident occurred a few minutes before time to quit work in the evening. The insured arrived home about an hour later, and Mrs. Day examined the injury and found a bruise on the back about an inch and a half in diameter. She bathed the bruise that night with turpentine, and the next morning Mr. Day went to work, and the next evening Mrs. Day again bathed the bruise with turpentine. The bruise continued to swell until about the 20th of August, when Dr. Davis was called and pronounced the bruise a carbuncle. Thereafter Dr. McKinnon was called, and he, also, pronounced the bruise a carbuncle and lanced it. From the time of the injury the bruise continued to get worse, but Mr. Day went about his work until about the 20th of August. On the 23d he was taken to a hospital at Seattle and Dr. Willis was called. At that time Mr. Day was in a very serious condition. Dr. Willis called Dr. Burns in consultation and they concluded that nothing could be done for Mr. Day. That night about 12:30 Mr. Day died.

Prior to the time of the injury, Mr. Day had been in perfect health and had never been sick, except on one occasion when he had typhoid fever, which was many years ago. At that time he was advised that he might be subject to diabetes on account of the fact that he was a large man and a hearty eater. In answer to in-

terrogatories propounded to Dr. Willis, he stated as follows:

"When and where were you first called to attend deceased on account of his last illness? (a) Time 1 o'clock p. m. Wednesday, 23rd day of August, 1916. (b) Place, Seattle General Hospital.

"What was the direct or immediate cause of death? Answer in detail. Infection from carbuncle on back.

"What was the indirect cause or contributing cause of death? Answer in full detail. Diabetes, also history given of an accident which may have been the beginning of the carbuncle.

"Are you satisfied that the death of the deceased was due solely to bodily injuries effected exclusively and directly by external, violent and accidental means? No.

"Are there any facts not stated above which would serve to give a better understanding of the case? If so, state them. When I was called he was suffering from a severe infection from a very large carbuncle on the lower part of the back. Had sugar in the urine and gave a history of an accident a short time previously."

Dr. Burns gave answers substantially to the same effect. These two doctors did not see the patient until about twelve hours before his death, and then but for a few minutes. At that time the patient was in a semi-conscious condition. The other two doctors who had previously treated the patient, were not called as witnesses. Upon the answers to these interrogatories, the appellant argues that the death of the insured was not caused by external, violent and accidental means, but was caused by a disease with which the deceased was suffering at the time of the injury. The only evidence that the deceased was suffering from any disease at the time of the injury is contained in the answers to the questions of Doctors Willis and Burns, the substance of which is above quoted. We

think it cannot be said from this evidence alone that the death of the insured was caused by a disease other than the disease developed from the bruise. Counsel for appellant argue that the injuries caused by the handle of the hand-car striking deceased was not sufficient to cause a boil, but we think it is plain from the testimony of Mrs. Day and her daughter, who examined the deceased within a short time after the accident, that a large bruise, an inch and a half in diameter, was upon the small of his back. This bruise continued to grow worse and developed into a carbuncle, and the carbuncle, after it was lanced, developed an infection which caused the death of deceased. This clearly made a *prima facie* case of death from external, violent and accidental means. In order to show that the death was not caused by external, violent, accidental means it was necessary to show that there was some other cause. The evidence falls far short of showing any other cause.

The rule in cases of this kind is fairly stated, we think, in *White v. Standard Life & Accident Ins. Co.*, 95 Minn. 77, 103 N. W. 735, 884, as follows:

"Similar policies have been before both the state and federal courts, and the consensus of judicial opinion is that, subject to the exceptions contained in the policy, if the injury is the proximate cause of death, the company is liable, but, if an injury and an existing bodily disease or infirmity concur and co-operate to that end, no liability exists. If, however, the injury be the cause of the infirmity or disease—if the disease results and springs from the injury—the company is liable, though both co-operate in causing death. The distinction made in this particular is found in that class of cases where the infirmity or disease existed in the insured at the time of the injury, and, on the other hand, that class of cases where the disease was caused and brought about by the injury. And

even in cases where the insured is afflicted at the time of the accident with some bodily disease, if the accidental injury be of such a nature as to cause death solely and independently of the disease, liability exists."

We think it is plain from the evidence that the bruise was the primary cause of death; it developed into a carbuncle and an infection which caused the death. We find no evidence to indicate that deceased was afflicted with diabetes prior to the injury, and there is no evidence to show that the symptoms of diabetes were not caused by the infection. It is more probable that the symptoms of diabetes were caused by the injury, than that death resulted from diabetes or other disease.

We are satisfied the trial court properly gave judgment in favor of the respondent.

Affirmed.

MAIN, C. J., PARKER, FULLERTON, and HOLCOMB, JJ., concur.

[No. 14950. Department Two. January 2, 1919.]

In the Matter of the Adoption of LA VAUNNIE RISING.[1]

ADOPTION (5) — NOTICE — PERSONS ENTITLED. A divorcee, who came into the possession of a child in its infancy, and had no interest except to pay alimony awarded for its support, not being the father of the child, is not entitled to notice of proceedings for its adoption.

SAME (4)—CONSENT OF MOTHER. A writing whereby the mother voluntarily gives up all claim to her infant child, then delivered to a foundling home, is sufficient consent to a subsequent adoption of the child, and obviates the necessity of notice to the mother under Rem. Code, § 1696.

SAME (5)—NOTICE—SUFFICIENCY. Where a child has been declared a dependent child and made a ward of the juvenile department of the superior court, subsequent adoption proceedings in the same court are sufficient notice to the juvenile department, the knowledge of the judge hearing the matter being at least notice of the hearing to the other department.

SAME (9)—SETTING ASIDE—FITNESS OF PETITIONER. Where, in dependency proceedings, a woman had been found to be a suitable person to have custody of the dependent child, and later on obtaining a divorce she was again awarded its custody as a suitable person, an objection to adoption proceedings by her that a next friend should have been appointed to represent the infant on the determination of the fitness of the petitioner, is insufficient to warrant vacation of a decree of adoption.

Appeal from an order of the superior court for King county, Smith, J., entered March 5, 1918, vacating an order of adoption, after a hearing before the court. Reversed.

Jay C. Allen, for appellant.

Gill, Hoyt & Frye, for respondent.

MOUNT, J.—This appeal is from an order of the lower court vacating an order of adoption of an infant child. The adopting parent has appealed. The

[1]Reported in 177 Pac. 351.

facts are as follows: On March 4, 1912, at Toronto, Canada, a child was born to Lora Cairney, who at that time was not married. On May 18, when the child was a little more than two months old, the mother gave the child to a foundling home at Toronto, and at the time executed the following writing:

"This is to certify that I, Lora Cairney, voluntarily give up all claim to my infant daughter, Elsie Cairney, born March 4, 1912, having been unable to support said infant."

This writing was dated May 18, 1912, signed by Lora Cairney in the presence of two witnesses. Shortly thereafter, in the same year, the care, custody and control of this child, together with the original writing, were, by the officers of the foundling home, given to one Arthur E. Rising and Bernile Rising, who at the time were husband and wife. They thereafter called the child La Vaunnie Rising. The Risings took no steps to legally adopt the child, contenting themselves with giving it proper care and attention. Thereafter, on the 19th day of October, 1915, Bernile Rising instituted an action for divorce in the superior court of the state of Washington for King county, where the Risings then resided. Before answer was filed in the divorce case, a petition was filed in the juvenile department of the superior court of King county alleging that the child was a dependent child. This petition came on regularly for hearing, and the juvenile department of the court entered an order upon that hearing adjudging the child to be a dependent child, the order reciting:

"It appearing to the court that the said Mrs. Bernile Rising is competent to have the care and custody of said child; it is hereby ordered by the court that the said La Vaunnie Rising be and remain a ward of this court, and that she be permitted to go hence in the

custody of Bernile Rising, with whom she shall reside subject to the supervision by a probation officer of this court, to be returned for further hearing herein whenever it shall be for the welfare of the said child."

Thereafter the answer in the divorce case was filed by Arthur E. Rising, which contained a cross-complaint for a divorce. The action for divorce resulted, on the 21st day of February, 1916, in a decree granting Mrs. Rising a divorce. That decree provided:

"That the disposition of the said child heretofore made by the juvenile court of King county, will remain in force; that thirty dollars a month, commencing March 1, 1916, for one year, for settlement of property interests and support of the said child, and the further sum of twenty dollars per month, commencing March 1, 1917, and continuing until the further order of this court, is a reasonable amount to be allowed plaintiff, and contributed by the defendant for the support of the said child; that so long as he shall obey the orders of the court herein the defendant shall be entitled to see said child at reasonable times."

After the entry of that decree, Arthur E. Rising left the state of Washington and thereafter lived in California, and the child remained in the custody and under the care of Bernile Rising at all times. Thereafter, on the 26th day of July, 1917, Bernile Rising petitioned the superior court of the state of Washington for King county for leave to adopt the said child. No notice was given to Arthur E. Rising of the adoption proceedings. It is admitted that, at the time of the making of that application and prior thereto, Arthur E. Rising was a nonresident and was absent from the state of Washington, and that he was during all of said time a resident of the state of California.

At the time of the hearing of the petition for adoption, the fact that the child had been decreed to be a dependent child by the juvenile department of the

said court, and the orders relative to said child by said juvenile department of said court, were made known to the court, and the court, after hearing, granted the petition for adoption and entered a decree accordingly. Thereafter, on the 19th day of September, 1917, Arthur E. Rising filed a petition in the adoption proceedings, seeking to have the decree of adoption vacated and set aside. On issue joined upon the petition, and after hearing, the trial court found the facts substantially as we have above indicated, and found that no notice of the petition for adoption was given to the juvenile department of the court or any of its officers or agents; that the juvenile court had no notice of the petition; that no notice of the petition for adoption was given to Arthur E. Rising, and that, at the time of the hearing of said petition, the mother of said child was not present and was not notified of the adoption proceedings, and that no next friend to said child was appointed by the court. The court thereupon concluded that the adoption proceedings were void and of no effect, and for that reason set aside the order of adoption. The question in the case is whether the superior court of King county, which made the order of adoption, had jurisdiction sufficient upon which to base the order. The statute provides, in § 1696, Rem. Code, as follows:

"Any inhabitant of this state, not married, or any husband and wife jointly, may petition the superior court of their proper county for leave to adopt and change the name if desired, of any child under the age of twenty-one years, but a written consent must be given to such adoption by the child, if of the age of fourteen years, and by each of his or her living parents who is not hopelessly insane or a confirmed drunkard. If there be no such parents, or if the parents be unknown, or shall have abandoned such child, or if such parents, or either of them, are hopelessly insane, or a

confirmed drunkard, then by the legal guardian; if there be no such guardian, then by a discreet and suitable person appointed by said court to act in the proceedings as the next friend of such child: Provided, however, that if the parents are living separate and apart, the consent of both is not required, but such consent may be given by the parent having the care, custody and control of such child."

It is argued by appellant that there was no necessity under the statute for notice to be given to Mr. Rising, because he was a nonresident and had no interest in the child; that it was not necessary to notify the mother of the child, because she had, in writing, given up all claim to the child; and that it was not necessary to serve a formal notice upon the juvenile department of the superior court, or any officer thereof, because the application for adoption was tried to one department of the superior court and that department was informed of all the proceedings which had theretofore taken place in reference to the child.

The respondent, on the other hand, argues that, because this child was a dependent and abandoned child, it was necessary, under the statute, that a next friend of the child be appointed to determine the propriety of the adoption by the applicant and to determine her qualifications and fitness to adopt the child.

From the statement of facts which we have made above, it will be noticed that Arthur E. Rising was not a parent of the child. He and his former wife had obtained the possession of the child in its infancy and, during their short marriage, had its care and custody. Upon the decree of divorce, he was required to pay a certain amount monthly for the support of the child. That was the extent of his interest. At the time of adoption proceedings, he was a nonresident of the state, a resident of California, living separate and

apart from the appellant, therefore his consent was not required under the statute. It will also be noticed that, when the child was a little more than two months of age, its mother, by writing, voluntarily gave up all claim to the child. The child was delivered to a foundling home at Toronto. Thereafter, within a short time, the officers at that home delivered the child to Mr. and Mrs. Rising. The child was born out of lawful wedlock. Its father is unknown. The mother was known. The writing which she delivered to the officers of the foundling home and which was subsequently delivered to Mr. and Mrs. Rising, was sufficient authority for them to adopt the child without further notice. If it was sufficient for the two, it was sufficient for Mrs. Rising. *In re Potter,* 85 Wash. 617, 149 Pac. 23, where a writing was given as follows: "I hereby turn over my right and title of my baby girl, born November 23, 1910, to Mrs. Nellie Myers, Riverside, Wash. E. N. Potter." We there said:

"That the writing made by the mother at the time the baby was turned over to appellant is a sufficient evidence of consent to an adoption."

We are of the opinion that the writing in this case was also sufficient evidence of consent to the adoption, though it does not name the person to whom possession of the child is given. We are further of the opinion that, if notice to the juvenile department of the superior court was necessary, sufficient notice was given. It is conceded that, at the time of the hearing upon the petition for adoption, the fact that the child had been declared to be a dependent child, the fact that it had been placed in the custody of the appellant, who now seeks to adopt it, and the fact that the appellant had possession of the child by reason of that custody, were all made known to the superior court of

King county. It is true the juvenile department of the superior court is not the department by which the adoption proceedings were determined, but it is a branch of the same court, and the knowledge of the judge in that department must be construed to be at least notice to the other department of the fact that the case was being heard in the adoption matter. It was not necessary for that department to give consent to adoption.

It is argued by respondent that one of the material questions to be tried in an adoption proceeding is the fitness of the person seeking to adopt, and that without the appearance of a next friend or some person to make an issue thereon, that question would not be determined. That question had, upon at least two previous occasions, been raised and determined, first in the juvenile department, where the child was declared to be a dependent child, and where the court found that appellant was a suitable person to have the care and custody of the child and its custody was awarded to her. Upon trial of the divorce case, that question was again determined, and the court concluded that appellant was a proper person to have the care and custody of the child, and made an order to that effect. Upon all the facts in the case, we are satisfied that the court which entered the order of adoption had jurisdiction to make the order, and that it was not necessary to give the natural mother of the child further notice, and that it was not necessary for Arthur E. Rising to have notice of the application, and that, if it was necessary to notify the juvenile department of the superior court of the proceedings in adoption, the notice to the judge trying the adoption proceedings was sufficient for that purpose.

In *In re Lease*, 99 Wash. 413, 169 Pac. 816, the natural father, who resided within the state and whose whereabouts was known, had not given consent to the adoption. We held there it was necessary that he have notice of the adoption proceedings, but that case does not control this case. We think this case is more nearly controlled by the case of *In re Potter, supra.*

The order vacating the adoption proceedings is therefore reversed, and remanded with instructions to dismiss the application to vacate the order of adoption.

PARKER and HOLCOMB, JJ., concur.

FULLERTON, J. (concurring)—The proceedings had in the adoption of the minor child in question are irregular and subject to be set aside by any person having such an interest as to entitle him to question them, but they are not void. The respondent, Arthur E. Rising, has no such interest as to entitle him to question the proceedings. He is neither the natural nor the adopted father of the minor, and is not related to it in any other way. True, he permitted a judgment to stand against him which required him to contribute to the child's support, but this gives him no interest in the child, nor any right to control its custody. The judgment itself was erroneous, and has validity merely because entered in a court of general jurisdiction which had jurisdiction over the subject-matter and over the person of the respondent. The record clearly shows that it had no foundation in either law or fact, and could have been set aside by the respondent had he proceeded against it at the proper time and in the proper way.

Since, therefore, the respondent was without interest sufficient to question the adoption proceedings, his application to set them aside should not have been en-

tertained by the trial court, and the order is subject to review in this court. For these reasons, I think the judgment directed in the majority opinion is right, and concur therein, although I cannot think the reasoning upon which it is rested is tenable.

MAIN, C. J., concurs with FULLERTON, J.

[No. 14388. Department Two. January 6, 1919.]

F. V. FISHER *et al.*, *Appellants*, v. JOHN A. WARD *et al.*, *Respondents*.[1]

FRAUDULENT CONVEYANCES (92, 97)—TRANSACTION BETWEEN RELATIVES—PREFERENCE—CONSIDERATION—EVIDENCE—SUFFICIENCY. Transfers by a failing debtor of all his available resources to his daughter in consideration of a previous promise to pay her $25 a month as housekeeper during the previous five years, are shown to be fraudulent as to creditors, where the proof of the agreement was not satisfactory and it appears that the property was worth considerably more than his daughter's claim, and he continued to exercise dominion over it, negotiating a mortgage upon it and offering part of it to a creditor in settlement of the indebtedness; since preference to one in such relation requires satisfactory proof of good faith and consideration, subject to the closest scrutiny.

Appeal from a judgment of the superior court for King county, Jurey, J., entered March 3, 1917, in favor of the defendants, dismissing an action to set aside deeds and to subject property to the lien of judgments, tried to the court. Reversed.

Melville Monheimer and *Jay C. Allen*, for appellants.

FULLERTON, J.—The appellants, composing the two partnership firms of M. & K. Gottstein and Kreielsheimer Brothers, were judgment creditors of the respondent John A. Ward to the extent of $2,166.55.

[1]Reported in 177 Pac. 682.

Prior to the rendition of their judgments, Ward and his wife conveyed to their daughter, Ethel, a tract described as the north half of the northeast quarter of the southeast quarter of section 16, township 22 north, range 5 east, W. M., and also a tract described as lot 2, section 27, township 22 north, range 5 east, W. M., containing in all about thirty-seven and one-half acres. The tracts were variously estimated as of a value of $4,700 to $7,700, and were subject to an incumbrance of $2,500. The purported consideration was the sum of $1,500, due the daughter under a contract for personal services at $25 per month for a period of five years, in acting as housekeeper for her parents and taking care of an invalid mother. At the time of the conveyance, the only other property owned by Ward was a lot in the Georgetown district of Seattle, Washington, upon which was located a public garage and his family home. This property was variously estimated as worth from $12,000 to $30,000, but was incumbered by a $12,000 mortgage and Ward's right of homestead exemption. In addition to the indebtedness due to the appellants, Ward was indebted to other parties upon deficiency judgments in sums of $4,914.10 and $1,636.55. The appellants began an action to set aside the conveyances made by Ward to his daughter and to subject the property to their liens, upon the ground that the transfers were voluntary and fraudulent. On a trial before the court, decree was rendered in favor of the respondents and dismissing appellants' action.

The record shows that the appellants, M. & K. Gottstein, and Kreielsheimer Brothers, were wholesale liquor dealers, with whom Mr. Ward had dealt for a number of years in purchasing liquors for a saloon conducted by him in Georgetown, the dealings between the parties being represented by open accounts

upon which Ward from time to time made payments. By reason of the state prohibition law, which was to go into effect January 1, 1916, thereby requiring saloons to close business by that date, the appellants, in the year 1915, ceased to extend further credits to Ward, selling him goods only for cash, and frequently urging him to liquidate their outstanding accounts against him. During this period Ward was in straitened circumstances and unable to meet numerous maturing debts. On May 27, 1915, a mortgage by him was foreclosed for the sum of $13,500, interest and costs, and the mortgaged property sold, leaving a deficiency judgment of $4,914.10, under which other property was levied upon and sold on November 22, 1915. A suit to foreclose another mortgage for $4,000 was commenced July 16, 1915, and the property sold under foreclosure on November 13, 1915, leaving a deficiency judgment of $1,636.55. On July 14, 1915, a suit to foreclose a $12,000 mortgage upon what is known as the Georgetown garage property was commenced, but was subsequently discontinued upon Ward's paying the interest, amounting to $420, together with costs and attorney's fees. This mortgage was thereupon extended and is still outstanding. The only other realty owned by Ward at this time was that which he conveyed to his daughter in October, 1915, consisting of two tracts before described. Upon this latter property, a mortgage of $600 was placed after it was put in the daughter's name. The appellants, in the year 1916, issued executions upon their judgments, upon which a return of *nulla bona* was made.

While the evidence as to the value of the home property varied somewhat widely, we are satisfied that the property at a forced sale would have failed to realize more than the indebtedness thereon, and that, at the time the deed to the daughter was executed, Ward was

possessed of no available property capable of being applied on his indebtedness, other than that which was turned over to her.

The question then is, was the daughter such a creditor as to render valid a preference to her over other creditors. On this phase of the case, the only testimony is by the daughter, the father not having testified on the particular question. Her testimony is positive and is uncontradicted, except it may be inferentially. Her demeanor as a witness, however, was unsatisfactory in some particulars, owing to her refusal to answer questions, apparently under an apprehension that she might be led thereby into damaging admissions. The purport of her testimony was that she abandoned the study of art, which she had planned to pursue, and took up household service at the insistence of her father, for which she was to be compensated at the rate of $25 per month; that an agreement therefor was entered into with her father when she was eighteen, and thus of legal age to contract; that she had never been paid, but had been given her board and clothing and supplied with spending money by her mother; that, at the time of the conveyance to her, she had served for a period of five years, entitling her to $1,500; that, upon her demand for her remuneration, her father turned over to her the property in question, which she admitted was worth $700 more than her claim; that her mother was an invalid, and the employment of a housekeeper would have been necessary if she had declined to serve in that capacity. On the other side, it appears that the father conducted the negotiations by which the mortgage of $600 was placed on the property, and that he banked the money in his own name and seems to have had the handling of it, although the daughter testifies that the money was obtained for her benefit, and a portion of

it was shown to have been expended in improving and caring for the property standing in her name. A further pertinent fact to be noted is that, after this transfer by the father to the daughter, the father tendered to his creditor Kreielsheimer Brothers one-half of the twenty-acre tract subject to the $600 mortgage, in settlement of his judgment indebtedness to that firm.

It seems to us that the transaction has many of the badges of fraud. The debtor, while in failing circumstances and pressed by his creditors, transferred to his daughter his only available resources, and still continued to exercise dominion over the property following its transfer. The transfer was made for an alleged past consideration of a promise to pay $25 per month, upon which not a single monthly payment had been made in a period of five years. The value of the property transferred was considerably in excess of the alleged claim of the daughter; and, more than this, the proof of the contract indebtedness fell far short of being satisfactory and convincing. While it is true that a failing debtor is privileged to prefer a member of his family to the exclusion of other creditors, it can be sustained only in case of satisfactory proof of good faith and upon a *bona fide* indebtedness to such member. And it is the prevailing rule in this country that the relationship of parent and child is a circumstance which requires a conveyance by an insolvent parent to his child to be subjected to the closest scrutiny. Taking into consideration all the facts shown in the record, we are satisfied that a presumption of fraud is clearly presented by the evidence, and that it has not been satisfactorily overcome by the countervailing evidence. Moreover, the consideration is based upon an alleged promise to pay for the natural services of the daughter as a member of the

household, the services being such only as are customarily rendered by a child dwelling under the parental roof and who was otherwise provided with support and maintenance by her parents.

The judgment of the trial court is reversed, with instructions to subject the property to the liens of the respondent's judgments, subject to the several mortgages thereon.

MAIN, C. J., PARKER, MOUNT, and HOLCOMB, JJ., concur.

[No. 14685. *En Banc.* January 6, 1919.]

F. G. NOYES, *as Receiver of the Washington-Alaska Bank, Appellant,* v. W. H. PARSONS *et al., Respondents.*[1]

LIMITATION OF ACTIONS (56-58)—DISCOVERY OF FRAUD—OPPORTUNITY FOR DISCOVERY. An action by a receiver, suing on behalf of creditors to set aside as fraudulent a consolidation or transfer of all the assets of one bank to another, is barred by the statute of limitations, Rem. Code, § 159, subd. 4, limiting actions for relief upon the ground of fraud to three years after discovery of the fraud, where the transfer was void as violative of the common law and of the law of the state wherein the grantee bank was incorporated, and such fact was or should have been known to the creditors and to the receiver upon his appointment upon acquiring knowledge of the consolidation, which was more than three years prior to the commencement of the action; since he and the creditors were thereupon immediately charged with notice of the illegality as a fact incapable of concealment, or discoverable with ordinary diligence.

SAME (83) — PLEADING — MATTERS AVOIDING BAR — DISCOVERY OF FRAUD. In an action for relief upon the ground of fraud, in pleading want of knowledge and excusatory facts for delay in bringing the action, a general allegation of ignorance at one time and knowledge at another is not sufficient, but the pleader must set forth the facts constituting impediment to an earlier prosecution of the claim.

[1]Reported in 177 Pac. 651.

Appeal from a judgment of the superior court for King county, Mitchell, J., entered July 23, 1917, upon sustaining a demurrer to the complaint, dismissing an action for equitable relief, tried to the court. Affirmed.

Hughes, McMicken, Ramsey & Rupp, De Journal & De Journal, and *Roy V. Nye,* for appellant.

Clise & Poe and *Peters & Powell,* for respondents.

HOLCOMB, J.—This is an action of equitable nature, by the receiver of an insolvent domestic corporation against its trustees and officers, with whom the other stockholders are joined as defendants because of their participation in the wrongs charged, to recover for the amounts taken from the corporation's assets by another corporation in whose possession and control it is alleged the defendants, in violation of their duties as trustees and officers, merged their own corporation. The facts stated in the complaint may be summarized as follows:

In the year 1908, there were engaged in the banking business at Fairbanks, Alaska, a Washington corporation, called the Washington-Alaska Bank, and a Nevada corporation, called the Fairbanks Banking Company. On September 16, 1909, the Washington company sold its business to the Nevada company, at the same time transferring all its shares of stock to the purchaser. The purchase price was $250,000, covering par value of the stock and a bonus of $100,000. At the time of the sale, the deposits of the Washington company amounted to $1,848,027.72. The amalgamated banks were for more than one year operated by the purchaser ostensibly as two institutions, but on October 8, 1910, the Fairbanks Banking Company amended its articles of incorporation in Ne-

vada, changing its name to the Washington-Alaska Bank, the same name as that of the Washington corporation, and took into its exclusive possession all the assets, fixtures, and personal property in Alaska of the two concerns. In January, 1911, the consolidated bank closed its doors and a receiver therefor was appointed by the Alaska court. At that time the Nevada company had on hand $525,828.05, representing moneys due the depositors and creditors of the original Washington company, of which sum such creditors had been paid by the receiver dividends aggregating fifty per cent of their claims. In 1915, the receiver learned for the first time that, under the statutes in Nevada, it was unlawful for the Nevada corporation to invest its funds in the stock of another bank. This knowledge having been imparted to a creditor of the original Washington company, the creditor instituted a suit in the superior court of King county, Washington, to obtain a receiver for the Washington company, which was successful, and the appellant herein, who was acting as receiver for the Nevada company, was appointed receiver for the Washington company. The receiver thereafter instituted the present action against all the trustees, officers and stockholders of the Washington company, alleging fraud on their part in transferring their stock and the assets of the Washington company to the Nevada company, and praying for a personal judgment against the respondents in the sum of $409,764.36, with interest from January 4, 1911. The respondents demurred to the complaint upon the grounds, (1) that the plaintiff has no legal capacity to sue; (2) that there is a defect of parties plaintiff; (3) that several causes of action have been improperly united; (4) insufficiency of facts to state a cause of action, and

(5) that the action has not been commenced within the time limited by law. The trial court sustained the demurrer upon the last ground.

Disregarding all questions as to the sufficiency of the complaint, except that it contains on its face facts germane to the question of when the alleged fraud was discovered, or should have been discovered, by appellant, we pass at once to a consideration of the question of whether the action is barred by the statute of limitations.

It appears on the face of the complaint that the alleged fraudulent acts of the respondents occurred on September 16, 1909; that the receiver for the insolvent Nevada company was appointed in January, 1911, at which time he took charge of the books and assets of the company, including the books and accounts of the Washington company. It is alleged, however, as an excusatory fact, that the receiver did not discover the fraudulent character of the transaction between the two banks until May, 1915, when he learned for the first time that the Nevada company was without power under its domiciliary laws to acquire the stock of another banking institution.

The statute governing such cases, Rem. Code, § 159, subd. 4, provides a three-year limitation upon "an action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." The present action was begun September, 1915, about seven years after the consummation of the alleged fraud. The fact which appellant contends it did not discover until May, 1915, and by lack of knowledge of which it is excused from bringing an action upon the grounds of fraud alleged sooner than that date, is that there is a Nevada statute prohibiting the purchase by Nevada banking

companies of the stock and assets of other banking companies, and that, perforce, the sale by the Washington company and the purchase by the Nevada company was *ultra vires* the charter powers of the Nevada company, and consequently illegal and void. It is urged that the companies dealt with one another with knowledge of such illegality, but were silent as to the existence of the Nevada statute, to the creditors and to the receiver of the Nevada company and of the Washington company, and hence concealed the fact of the Nevada statute, or that the Nevada statute, being a foreign law, concealed itself.

As we view the complaint, however, the substantive fraud alleged is not the *ultra vires* act of the Nevada company, but the conduct on the part of the stockholders of the Washington company in disposing of its entire assets in such a way as to inflict injury upon its creditors and depositors by means of a transaction impairing the resources upon which the creditors and depositors of the Washington company had a right to rely. The existence or non-existence of the Nevada statute, therefore, and whether it had any extra-territorial force or not—which is a question open to some debate—and knowledge or ignorance of that statute on the part of either the creditors or the receiver, was, it seems, wholly immaterial. Whatever fraud and injury there were, were then fully accomplished. The gist of the action would have been the same if the Nevada statute had never been enacted. The injury inflicted would have been the same with or without that statute. The fraud, if any, was consummated in Alaska, and would have been equally remedied under the common law of that jurisdiction without reference to a foreign statute governing or limiting the charter powers of the foreign corporation.

The complaint alleges that the stockholders of a solvent Washington corporation transferred its stock and assets to an insolvent Nevada company in carrying out a conspiracy to deplete the assets of the Nevada company in the sum of $250,000, for the benefit of the selling stockholders and with the object of enabling the Nevada company to withdraw $200,000 from the assets of the Washington company, alleged to have been a fictitious deposit on the part of one Barnette to apply in liquidation of his fictitious deposit and credited to him as a stockholder of the Nevada company on the books of that company. Receiver Noyes was the representative of the so-called Washington company creditors, and since they were in reality likewise creditors of the Nevada company, which they continued to patronize as the successor of the Washington company, he was their representative, and they, as creditors, must be deemed charged with whatever knowledge the receiver derived or had an opportunity to learn from his inspection of the books and accounts of the Nevada company in January, 1911. He is chargeable with knowledge of the fraud from that date, and the creditors must be held to have had constructive knowledge thereof. In this action he is suing on behalf of the creditors, not on behalf of any stockholders. In fact, he is seeking to hold responsible and liable the stockholders of the corporation. Nor is this a suit on behalf of the state to set aside an unlawful consolidation of two corporations. Conceding that matter of foreign law is matter of fact, as contended by appellant, in construing this section of the statute of limitations, we have many times held that whatever is notice enough to excite attention and put a party upon his guard or call for an inquiry, is notice of everything to which such inquiry might have led. The

presumption is that, if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it.

"A party defrauded must be diligent in making inquiry. The means of knowledge are equivalent to knowledge. A clue to the fact, which, if followed up diligently would lead to a discovery, is in law equivalent to discovery—equivalent to knowledge." *Deering v. Holcomb,* 26 Wash. 588, 67 Pac. 240, 561.

See, also, *Irwin v. Holbrook,* 32 Wash. 349, 73 Pac. 360; *McDonald v. McDougall,* 86 Wash. 339, 150 Pac. 625; *Hoy v. Burk,* 92 Wash. 536, 159 Pac. 701.

Appellant here inconsistently urges that the transaction complained of is violative of not only the Nevada statute, but also of the common law; that is, of public policy. We are, ourselves, of the opinion that it was violative of public policy, and therefore of the common law, and must assume the common law to be the same in Alaska as in this jurisdiction. The transaction thus falls within the scope and spirit of many state and Federal decisions cited and quoted by appellant. If that be true, then the receiver or the creditors, upon knowledge of the admitted or pretended consolidation of the Washington and Nevada corporations, were immediately charged with knowledge of the violation of public policy and of the common law of Alaska, and it was immaterial in that case whether the act was violative of the statutory powers of the Nevada corporation. Ignorance of the law was not excusable, although ignorance of a fact often is.

Appellant also adopts a somewhat inconsistent theory that the law of the place of domicile of the corporation follows the corporation and governs its every act wherever performed, and that the general laws of

the place of domicile of a corporation, regulating the powers and duties of corporations, govern its charter powers as well as the act authorizing the charter powers itself, and go with the corporation wherever it goes. We will not enter into a discussion of this question of the extraterritorial effect of such statutes, for, if that be true, we consider it incumbent upon persons dealing with such corporations to at some time ascertain, or fail at their peril, the law of the place of domicile of a corporation with which they deal, and its charter and general powers. The law of Nevada, considered as a fact in a foreign jurisdiction, is not such a fact as could be concealed by any person interested, such as ordinary occurrences between individuals, and when a receiver took charge of the business and assets of a defunct corporation with the duty resting upon him to wind up its affairs, there certainly was some duty resting upon him to acquire knowledge of the exact powers and limitations of the corporation.

The broad assertion that the statute does not run until the fraud is discovered is not tenable. The statute begins to run when the fraud should have been discovered, and a clue to the fact which, if followed up diligently, would lead to discovery, is in law equivalent to discovery. *Deering v. Holcomb, supra.* A general allegation of ignorance at one time and knowledge at another is of no effect. *Hardt v. Heidweyer,* 152 U. S. 547. In order to excuse a want of knowledge of the fraud, a pleading must set forth what were the impediments to an earlier prosecution of the claim, how the pleader came to be so long ignorant of his rights, the means, if any, used by the opposing party fraudulently to keep him in ignorance, or how and when he first obtained knowledge of the matter al-

leged in the pleading. *Pearsall v. Smith,* 149 U. S. 231.

The allegations contained in the complaint negative any excusable want of knowledge of any of the facts necessary to avoid the bar of the statute of limitations on the ground of fraud, and, on the other hand, demonstrate that all the substantive grounds of fraud were known at once, and any other fact necessary to have been known was not actively concealed, was not of a nature to conceal itself, and could have been known by the parties in interest by using ordinary diligence. This is sufficient to start the statute in question running, and justified the sustaining of the demurrer herein.

This being determinative of the matter, other questions presented by the briefs need not be considered. Judgment affirmed.

Main, C. J., Mount, Parker, and Tolman, JJ., concur.

Mackintosh and Mitchell, JJ., being disqualified, took no part.

[No. 14790. *En Banc.* January 6, 1919.]

DEMENT BROTHERS COMPANY, *Respondent,* v. CARL COON *et al., Appellants.*[1]

CONTRACTS (4) — REQUISITES — MUTUALITY — SALES. A writing signed by C. reciting that he sells wheat to D. for future delivery at a certain price, to which D. wrote the word "confirmed" and signed it, is not unilateral or void for want of mutuality, but is a sale binding on both parties.

FRAUDS, STATUTE OF (37)—MEMORANDUM—STATEMENT OF TERMS—TIME FOR PAYMENT. The failure of a contract for the sale of wheat for future delivery, to fix the time for payment, does not render it void under the statute of frauds; since in such case the law provides that payment and delivery shall be concurrent acts.

SAME (37). There is a sufficient compliance with the statute of frauds on the sale of wheat, payment to be made on delivery of warehouse receipts, where the memorandum of sale fixed the future delivery at one of two places to be chosen by the seller, but was silent as to time for payment, making payment and delivery concurrent acts; since the production of warehouse receipts would serve as proof of delivery according to the terms of the contract.

SALES (77)—FAILURE TO DELIVER—EXCUSES. The rejection of one sample of wheat, submitted at a place other than the place of delivery, does not excuse delivery according to the terms of sale covering several grades, especially where the parties thereafter agreed upon an extension of time for delivery.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered April 6, 1917, in favor of the plaintiff, notwithstanding the verdict of a jury in favor of the defendant, in an action on contract. Affirmed.

Sharpstein, Smith & Sharpstein, for appellants.

Evans & Watson, J. G. Thomas, and *W. A. Toner,* for respondent.

MITCHELL, J.—A transaction occurred between the parties to this action on August 4, 1916, and thereafter

[1]Reported in 177 Pac. 354.

another, relating to the same subject-matter, both of which were reduced to writing and signed, as follows:

"August 4, 1916.

"I sell to Dement Bros. Co. 6,000 bushels of Bluestem wheat, basis No. one grade, 201 sacks turkey red wheat basis No. one grade, and 500 bushels forty-fold wheat basis No. one grade, all at $1.03½ per bushel f. o. b. Reese or Welland sellers option. Delivery to be made on or before Sept. 30, 1916.

"Confirmed Carl Coon.
"Dement Bros. Co.
"By Morrison."

"We, the undersigned, hereby agree to an extension of time of delivery on the wheat contract of Aug. 4, 1916, to Dec. 1, 1916, instead of Sept. 30, 1916. All other conditions of contract to remain the same.

"Dement Bros. Co.
"By Morrison. Carl Coon."

The writing with reference to extension of time for delivery of the wheat was signed October 25, 1916. No wheat was delivered, and suit for damages followed. There was a trial to a jury, and a verdict for the plaintiff in an amount substantially less than sued for. Neither party moved for a new trial, but each presented a motion for judgment notwithstanding the verdict. The court granted plaintiff's motion and entered judgment for the full amount of damages claimed. Defendants appeal.

The amount of the judgment is not questioned if respondent is entitled to prevail. Errors assigned are expressed by three contentions of appellants, as follows: (1) That said contract is void for want of mutuality. (2) That said memorandum or contract is void for the reason that the same is not in compliance with the statute of frauds. (3) It is alleged that the respondent refused to accept certain wheat offered by

appellants in pursuance of said contract, and thereby absolved appellants from compliance therewith.

As to the first contention: The contract is an executory one and evidently it was intended to be, and is, bilateral. Appellants argue that the contract contains no promise on the part of respondent to receive the wheat nor to pay for it. We are satisfied to the contrary. By the writing, signed by Carl Coon, he said that he sells wheat to respondent, future delivery, at a stated price, f. o. b. at either of two places the seller prefers. Respondent wrote the word "confirmed" and signed it. Thereafter there was written on the instrument an agreement extending the time for delivery of wheat and a reaffirmance of all other conditions of the contract, which was signed by both parties. The rule by which we determine the intent of the parties and the meaning, or lack of meaning, of such a written instrument does not encourage an attempt to charm or transform it into a word puzzle, nor to do otherwise than take the words and signatures in their ordinary, everyday, popular sense. The contract is not an option given by Carl Coon, nor is it a unilateral agreement, such as the offer of a reward. By it Carl Coon said he sells wheat, future delivery, at a certain price, to Dement Brothers Company. It is impossible to sell unless at the same time there is a purchaser. The one obligation must have its corresponding and correlative obligation. Therefore, when Carl Coon signed the contract, he obligated himself to sell wheat, future delivery, at the price stated, to Dement Brothers Company, and when the latter wrote on it the word "confirmed" and then signed it, respondent entered into the correlative obligation of purchasing wheat, future delivery, at the price stated, from Carl Coon. The same may be said with reference to the obligation of respondent to receive the wheat. *But-*

ler v. Thomson, 92 U. S. 412; *Jordan v. Patterson,* 67 Conn. 473, 35 Atl. 521.

Appellants' second assignment of error is without merit. As we understand, it is claimed, first, that the contract is deficient because of indefiniteness as to price. It is plain and clear in this respect. And second, that it is faulty because the time for payment is not expressed. If there had been written into the contract the words "delivery and payment of the purchase price shall be concurrent acts," it would have been about as definite as possible, and yet not more so than it is, for "It is the rule that where the time of payment is not mentioned, then the law provides that the delivery of the article and the payment of the purchase price shall be concurrent acts." *Loewi v. Long,* 76 Wash. 480, 136 Pac. 673; 2 Mechem, Sales, § 1407. However, on this point, it appears from the proof there was an understanding that the price should be paid when warehouse receipts were delivered, and it is contended the writing is at fault for not so expressing it. Not so, however, for, by the agreement, the delivery was to be made at a place to be chosen by the seller, and the production of the warehouse receipt showing delivery at such place would serve as proof of delivery according to the terms of the contract, entitling the seller to pay.

As to the alleged refusal of respondent to accept certain wheat offered, the evidence shows that, about two weeks after making the contract and a few days after appellants commenced to thresh wheat, appellant Carl Coon took a sample of bluestem wheat only to respondent, who, upon testing it, said it gave Carl Coon to understand that, while the sample showed number one bluestem, the test could not be considered as sufficient for all the different kinds and the total amount contracted for, nor even for the six thousand

bushels of bluestem; while Carl Coon testifies that respondent stated it was not number one bluestem wheat and that it would not be accepted as such. As to which version of that transaction is correct is immaterial, for in either view it cannot be treated as a delivery. The contract provides for the delivery of all the wheat and at either of two places, at the option of the seller, other than the respondent's place of business, where this so-called test and conversation took place. Besides, as already noticed, this occurred in the month of August, and on October 25 a new agreement in writing was entered into by the parties extending the time for delivery of the wheat to December 1. The record suggests that the failure or refusal of appellants to deliver the wheat as they agreed is explained by the fact that the market price of wheat continuously advanced after the contract was made, rather than because of any alleged dispute over a test of one kind of wheat a considerable time prior to making the new agreement extending the time for delivery.

Judgment affirmed.

ALL CONCUR.

[No. 14810. Department Two. January 6, 1919.]

R. M. RAMAT *et al.*, *Respondents*, v. CALIFORNIA INSURANCE COMPANY, *Appellant*.[1]

APPEAL (473)—REVIEW—FORMER DECISION AS LAW OF CASE. A decision on appeal that the evidence made a question for the jury becomes the law of the case on a retrial, where the evidence was substantially the same as on the former trial.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 2, 1918, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on a fire insurance policy. Affirmed.

H. T. Granger, for appellant.

Cole & Dolby, for respondents.

PARKER, J.—The plaintiffs, Ramat and wife, seek recovery from the defendant insurance company upon a fire insurance policy covering their household furniture. Trial in the superior court for King county sitting with a jury resulted in verdict and judgment in favor of the plaintiffs for the sum of $500, the full amount for which the policy was issued. The defendant has appealed to this court.

A judgment was rendered upon a verdict in respondent's favor in the superior court upon a former trial therein, which was reversed upon appeal to this court (*Ramat v. California Ins. Co.*, 95 Wash. 571, 164 Pac. 219), and the cause remanded for a new trial. It was contended in appellant's behalf on the former appeal that the trial court erred in refusing to sustain its motion challenging the sufficiency of the evidence to support any recovery by respondents and asking that the cause be so determined in its favor as a matter of

[1]Reported in 177 Pac. 638.

law. The challenge so made upon that trial was overruled by the trial court and the cause was submitted to the jury on the single question of the amount of the loss; the trial court ruling, as a matter of law, that there had been a waiver of the provisions of the policy making it void if the insured then had, or should thereafter acquire, other insurance on the property, and the condition that the insured should, within sixty days after a fire destroying the property, render to the company a sworn statement of their loss. While this court held that the trial court correctly overruled appellant's challenge to the evidence and motion for judgment, it was because of the determination by the trial court of the two questions of waiver in respondent's favor, as a matter of law, that a new trial was awarded to appellants. The evidence given upon the trial touching the question of waiver on the part of appellants in these two particulars was, in substance, the same upon the second as upon the first trial; and upon that evidence the questions of waiver were submitted to the jury upon the second trial and decided in respondents' favor.

That our former decision has become the law of the case, holding, in effect, that the evidence was such as to call for the decision of the jury upon these questions of waiver, we think is plain, in view of the fact that the evidence upon the second trial was in substance the same as upon the first trial. Reversal of this judgment is sought upon the theory that the trial court erred in submitting to the jury these two questions of waiver. What was said in our former decision remanding the cause for new trial, we think, disposes of the contentions made in that behalf. The view of the law there expressed has since then been adhered to by us, referring specifically to that decision, in the

following cases: *Workman v. Royal Exchange Assurance,* 96 Wash. 559, 165 Pac. 488; *Boskovich v. Union Assurance Society,* 98 Wash. 579, 168 Pac. 166; *Gregerson v. Phenix Fire Ins. Co.,* 99 Wash. 639, 170 Pac. 331; *Robbins v. Milwaukee Mechanics Ins. Co.,* 102 Wash. 539, 173 Pac. 634.

The judgment is affirmed.

MAIN, C. J., MOUNT, HOLCOMB, and FULLERTON, JJ., concur.

[No. 14863. Department One. January 6, 1919.]

WILLIAM E. SHERMAN *et al., Respondents,* v. ALFRED PARKER, *Appellant.*[1]

VENDOR AND PURCHASER (60)—RESCISSION BY VENDEE—FRAUD—RELIANCE ON REPRESENTATION. A sale of arid land will be rescinded for fraud, where it was induced by the seller's misrepresentation that there was plenty of water to irrigate it, emphasized by a statement of his attorney to the same effect touching on the priority of rights under the law; the buyer having the right to rely on representations peculiarly within the seller's knowledge which were difficult of ascertainment by the vendee.

Appeal from a judgment of the superior court for Yakima county, Taylor, J., entered January 17, 1918, upon findings in favor of the plaintiffs, in an action for rescission, tried to the court. Affirmed.

Parker, LaBerge & Parker, for appellant.

Grady & Shumate, for respondents.

CHADWICK, J.—The court found that respondents had bought land of appellant under a misapprehension as to the appurtenant water rights, the land being practically valueless without water for irrigation, and a misapprehension as to the amount of land subject to

[1]Reported in 177 Pac. 665.

irrigation. It is contended that the representations which induced the sale were made by an agent whose authority was limited to the extent of finding a purchaser; that the representation of the owner that he had always had plenty of water to irrigate the place was no more than an expression of opinion and was qualified by the statement: "Now I will tell you Sherman, I am no lawyer; when we get down to Fred Parker's office he can tell you more about the water right than I can," and the statement of Mr. Fred Parker, when in consultation, that the law is that the first users of a stream have prior rights, that a number of people below the land involved had older rights, but since "we have had the place we have had no trouble with it," and that he, the witness, had never known of any trouble about the water right; that it was his opinion that the irrigation of the land was a benefit rather than an injury to the land below, because the water would run back into the stream and that that ground was the best reservoir that could be constructed; that respondents had been told by a third party that there might be some question about a water right to the land, and that they had ample time to satisfy themselves; and that the evidence preponderates in favor of the appellant.

The value of arid land is in the right or ability to irrigate it. We have not yet measured and fixed the extent of appropriation along the streams in the arid regions of the state, and therefore an abstract does not necessarily show the extent of a prior right, nor should neighborhood gossip or rumor estop a purchaser who buys land upon the assurance of the owner that he had never had any trouble about the water. This inducement was emphasized, it seems to us, by the statement of the attorney to the same effect, and the un-

disputed fact that the land had been in cultivation since 1875. Appellant knew that respondents were relying upon their prior quiet enjoyment and upon the advice of an attorney of their own choosing, for, as all men know, no one would buy arid land for a home unless he had a reasonable expectation of having "no trouble about water." The water was shut off of the land by the state hydraulic engineer shortly after respondents had taken possession. The latest expression of the court upon the right to rescind for misrepresentations in cases of this kind is to be found in *Smith v. Fletcher,* 102 Wash. 218, 173 Pac. 19, 636:

"The appellant contends, however, that, . . . the respondents are not entitled to recover, for the reason that their agent was on the ground and in a position to inspect the irrigation facilities and was urged by the appellant to do so. On that assumption he argues that, having had full opportunity to investigate the truth of the representations, he purchased at his own peril. But this court, in a line of cases extending from its earliest history down to the recent case of *Eyers v. Burbank Co.*, 97 Wash. 220, 166 Pac. 656, has adhered to the rule that, where facts are peculiarly within the knowledge of the vendor and difficult of ascertainment by the vendee, the vendee who relies on the vendor's word is entitled to rescind for misrepresentation as to material facts, although he may have inspected the land and made some investigation of the subject-matter of the representations."

There is some contention that appellant had a prescriptive right to use the waters of the stream. We question whether the use of water theretofore appropriated by another, but not yet put to a beneficial use, would avail to create a prescriptive right.

But be that as it may, it would entail an expensive piece of litigation, for men in the deserts will fight for water, even to the last drop. Respondents set out to

buy land, not a lawsuit. *Wilson v. Korte,* 91 Wash. 30, 157 Pac. 47.

The judgment is affirmed.

MAIN, C. J., MITCHELL, MACKINTOSH, and TOLMAN, JJ., concur.

[No. 14886. Department Two. January 6, 1919.]

GILE INVESTMENT COMPANY, *Respondent,* v. H. H. FISHER *et al., Appellants.*[1]

MORTGAGES (124-1)—PARTIAL RELEASE. Under a mortgage providing for partial releases upon recording a plat and the sale of lots, there can be no right to releases where the plat was not "placed on record" as stipulated in the mortgage.

MECHANICS' LIENS (83)—FORECLOSURE—LIMITATIONS. Where mechanics' liens that were subsequent to a mortgage were foreclosed without making the mortgagee a party, he is not bound, and the liens expire if suit is not commenced within the eight months limited by Rem. Code, § 1138.

SAME (71)—PRIORITIES—MORTGAGES. Where liens have expired by limitation as to a prior mortgagee, who was not made a party to the lien foreclosure, on foreclosure of the mortgage the lienholders can assert no priority over the mortgage by virtue of execution sales under their lien foreclosures.

SAME (8)—INTEREST SUBJECT—REMOVAL OF BUILDINGS—RIGHTS OF MORTGAGEE. Rem. Code, § 1146, providing for the removal and sale from the land of property subject to a mechanics' lien, in case title to the land cannot be subjected thereto, has application only to cases where the work or material was furnished at the instance of the owner of less than the fee, and not to liens placed by the owner of premises subject to prior mortgages.

Appeal from a judgment of the superior court for Pacific county, Hewen, J., entered November 5, 1917, upon findings in favor of the plaintiff, in an action to foreclose a mortgage, tried to the court. Affirmed.

N. H. Bloomfield, for appellants.

Welsh & Welsh, for respondent.

[1]Reported in 177 Pac. 710.

Holcomb, J.—Respondent brought this action to foreclose its mortgage, in July, 1916. On April 2, 1913, the Klipsan Land Company executed and delivered to the respondent three promissory notes, each for $3,356.25, with interest at six per cent per annum until paid, payable in one, two and three years, respectively. For the security of these notes, the Klipsan Land Company executed and delivered its mortgage. No part of the notes or mortgage had ever been paid, excepting that, on April 13, 1914, $500; on May 7, 1914, $50; on June 6, 1914, $50; and on October 10, 1915, $50, were paid.

The mortgage provided that, in case default be made in the payment of the principal or interest on any of said notes, the mortgagee had the option to elect and declare all of the notes to be due. It further provides:

"It is agreed between the parties hereto that the first party may, if he so desires to, cause said lands above described, or any part thereof, to be platted into lots and blocks, dedicating streets, alleys and public way to the public, and that immediately upon said plat being placed of record, the land so dedicated for streets, alleys or public way shall thereupon be discharged from the lien of the mortgage without any further action on the part of either party hereto.

"It is further agreed that if the first party shall plat said property above described or any part thereof into lots and blocks, that it may sell and dispose of any of said lots or any number of lots, and the second party will execute the proper instrument or instruments discharging from the lien of the mortgage the property so sold upon the first party giving to the second party one-half of the purchase price so received by second party for the property so sold, which payment so made shall apply on the principal and interest hereby secured. No lot to be sold for less than $50."

A plat of the lands was made, but it was never filed or recorded in the office of the county auditor for the

reason that the civil engineer refused to deliver same until paid for his services. The Klipsan Land Company, or Klipsan Hotel Company, commenced to erect a hotel building upon a part of the platted townsite property, which would comprise about six to eight lots of land approximately 300 by 450 feet in dimension, included in the Klipsan Land Company's mortgage to the respondent. Defendants Lee, Kline and Lagerquist performed work and labor upon the hotel building during 1914, and filed liens therefor which were assigned to defendants Fisher, Thorsen & Company, who had sold and delivered building material for the hotel building from June to September, 1914, and filed a lien for same. On June 12, 1915, Fisher, Thorsen & Company foreclosed these liens and obtained judgment for $1,436.18, costs $32.40, and an attorney's fee of $150, against the Klipsan Land Company, the only defendant. January 12, 1916, execution issued on this judgment, and Fisher, Thorsen & Company purchased at the sheriff sale, on February 19, 1916, for the sum of $1,720.87, the property described in the sheriff's deed issued to it February 24, 1917.

It was alleged by appellants that the Klipsan Land Company, when the material was used and when the work and labor were performed in the construction of the hotel building, had represented and agreed with and assured these several defendants that the indebtedness so created would be paid in cash, and if not, that they should and would have a lien upon the building and premises, with the right of removal of the building, inasmuch as it could be removed without injury to the land; that respondent had knowledge of and acquiesced in the agreement and representations of the Klipsan Land Company with the other defendants herein; that the hotel building can be removed without

injury to the land, and appellants desire to remove same; that the erection of the building and the furnishing of labor and material by defendants were with the knowledge, consent and concurrence of respondent for the purpose of increasing the value of the property under mortgage and its other holdings; that appellants were assured by the Klipsan Land Company that respondent's mortgage provided that the premises upon which the building was to be erected could, and would, be released from the effect of the respondent's mortgage upon payment of a minimum price of $50 per lot for the lots embraced in the hotel premises. Appellants made and kept good a tender of $400 for the purpose of having respondent decreed to release six lots of the hotel grounds from the effect of its mortgage.

Judgment of foreclosure was rendered for respondent, denying the appellants the right to have any part of the land released from the mortgage, from which they appeal.

Appellants contend that the court should have held: (1) That the appellants' rights under their sale and sheriff's deed are superior in law to those of the respondent, although subsequent in point of time; (2) that the Gile Investment Company, a stockholder, was bound by the representations of the Klipsan Land Company's president, Captain A. T. Stream, when purchasing the material and employing the labor in the construction of the hotel building; (3) that, under the peculiar circumstances shown in this case, the right of the removal of the building, if so desired, should have been granted; (4) that the respondent was estopped from claiming the superiority of its mortgage over the liens of the appellants; and (5) that plaintiff should be required to accept $300 of the $400

tendered and on deposit, covering the six lots at $50 per lot under the release clause of the mortgage, and to execute release accordingly.

Determining the fifth claim first, no relief can be granted of that nature, for the prime and sufficient reason that no plat "was placed of record" as stipulated in the mortgage, and no one, therefore, is bound by that provision, even granting that appellants, strangers to the agreement, would be entitled to the benefit of that stipulation.

No action was commenced to foreclose appellants' liens, as against respondent, within the life of appellants' liens. Rem. Code, § 1138, provides that:

"No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim has been filed unless an action be commenced in the proper court within that time to enforce such lien; . . ."

It was said in *Davis v. Bartz,* 65 Wash. 395, 118 Pac. 334:

"Since the lien expires by force of the statute unless action be commenced within the statutory time, it is necessary to the pleading and proof of a valid lien that the complaint allege and evidence show that the work was done or materials furnished within that time, or the action cannot be maintained. This necessarily results from the wording of the statute, as construed by this court in a number of decisions. *Rees v. Wilson,* 50 Wash. 339, 97 Pac. 245; *Northwest Bridge Co. v. Tacoma Shipbuilding Co.,* 36 Wash. 333, 78 Pac. 996; *Peterson v. Dillon,* 27 Wash. 78, 67 Pac. 397; *Powell v. Nolan,* 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

"It is the manifest purpose of this statute to require the claimant to bring suit to establish his lien while the evidence upon which it rests is sufficiently recent to enable any party interested to successfully contest it if the facts do not warrant the lien. The claimant must accord this opportunity within the time

limited or lose his lien. It is equally manifest that this right of contest is as valuable, and should be as available, to a mortgagee as to the owner. A mortgagee has something more than a mere right to redeem as against an antecedent lien. He has a right to contest its validity or assail its priority if the evidence warrants either defense. He is entitled to his day in court upon these matters, within the period fixed by the statute. In this respect there is no valid distinction between necessary parties and proper parties. *Union Nat. Sav. & Loan Ass'n v. Helberg,* 152 Ind. 139, 51 N. E. 916."

What appellants attempt is to establish their liens and judgment as superior equities, although subsequent in time, by alleged notice, consent, and estoppel. This they should have sought in their prior suit.

Respondent, not having been a party to appellants' lien foreclosure proceedings, cannot be bound by the lien judgment and have a prior mortgage subverted to inferiority to appellants' subsequent lien judgment. Appellants' second contention cannot be upheld for the same reasons.

As to the third contention, in regard to the removal of the building, we held in *Cutler v. Keller,* 88 Wash. 334, 153 Pac. 15, L. R. A. 1917C 1116, that § 1146, Rem. Code, providing for the removal and sale from the land of property subject to a mechanics' lien, in case the title or interest in the land cannot be subjected to a lien, has application only to cases where the work or material was furnished at the instance of a party owning less than the fee, and not to liens placed by the owner of the fee on premises subject to prior mortgages.

The judgment of the trial court must be affirmed.

Main, C. J., Mount, Fullerton, and Parker, JJ., concur.

[No. 14889. Department One. January 6, 1919.]

ULRICK J. RAYMOND *et al.*, *Appellants*, v. MICHAEL HATTRICK *et al.*, *Respondents*.[1]

SPECIFIC PERFORMANCE (24-1)—FRAUDS, STATUTE OF (46)—GIFT OF LAND—PART PERFORMANCE. An oral promise to make a gift of land accepted by the promisee, who enters into possession and makes valuable improvements, will be specifically enforced, the making of the improvements being equivalent in equity to an actual consideration and sufficient part performance to take the case out of the operation of the statute of frauds.

SAME (38)—LIMITATION OF ACTIONS (38, 44)—DEMAND. Limitations against an action to specifically enforce a promise to make a gift of land to a son-in-law and daughter, in consideration of living upon the land and the making of improvements, does not begin to run until demand for performance and refusal, in view of the intimate relations of the parties and the fact that there was no time fixed for performance or notice of breach.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered December 22, 1917, upon sustaining a demurrer to the complaint, dismissing an action for specific performance. Reversed.

Vince H. Faben, for appellants.

James R. Chambers, for respondents.

TOLMAN, J.—Appellants brought suit in King county to compel specific performance of an oral gift of real estate. To the second amended complaint, a demurrer was interposed, which being sustained, appellants elected to stand upon their complaint and judgment of dismissal was entered against them, from which they appeal.

The second amended complaint alleges, in substance, that appellants are husband and wife, and that the respondents are the parents of the appellant wife; that in March, 1912, the respondents were the owners of

[1]Reported in 177 Pac. 640.

lot 9, block 82, in Gilman's addition to the city of Seattle, and also owned and resided upon lot 11 of the same block, situated but forty feet distant from lot 9; that, in order to induce appellants to take up their residence near them, the respondents, in consideration of the benefits to flow therefrom to them, and in consideration of natural love and affection, promised to convey said lot 9 to the appellant wife if the appellants would build a residence thereon and reside therein; that, relying on such oral promise, appellants constructed a substantial residence with all modern improvements, on said lot 9, of the reasonable value of upwards of $2,000, all with the knowledge, consent, and advice of respondents, and went into possession thereof, and have at all times since been in the open and exclusive possession thereof, occupying the same as their residence, in accordance with the oral agreement; that the respondents frequently renewed their promise to convey, but neglected to do so until on or about August 25, 1917, when a demand was made for a deed, and respondents then, for the first time, refused to convey the property.

Two points appear to have been raised by the demurrer: first, that the agreement to convey, being oral, is within the statute of frauds; and second, that the action is barred by the statute of limitations.

Upon the first point, the law appears to be well settled that a sufficient part performance will take the case out of the statute of frauds, and this applies to gifts as well as to contracts.

"The doctrine of part performance applies to gifts as well as to contracts. An oral gift of land, or promise to give land, followed by the vendee's taking possession of the land in pursuance of the promise and making valuable and permanent improvements in reliance thereon, may be enforced by a court of equity

against the donor or his heirs or grantees with notice. If the promise to give is conditioned on the vendee's making improvements, a compliance with the condition furnishes a consideration for the transaction. But it is not necessary that there be a technical consideration. If the promise to give was wholly unconditional, the same relief will be given to the donee, based upon the same reasons of estoppel against the donor and virtual fraud upon the donee because of his change of condition as in the case of a parol sale with possession and improvements. The making of the improvements is both an act of part performance and the equivalent, in the view of equity, of an actual consideration." 36 Cyc. 681.

See, also, *Clancy v. Flusky,* 187 Ill. 605, 58 N. E. 594, 52 L. R. A. 277; *Burris v. Landers,* 114 Cal. 310, 46 Pac. 162; *Wainwright v. Talcott,* 60 Conn. 43, 22 Atl. 484; *Barrett v. Schleich,* 37 Ore. 613, 62 Pac. 792. This court has recognized this rule in *Coleman v. Larson,* 49 Wash. 321, 95 Pac. 262, where Judge Fullerton, speaking for the court, said:

"An agreement for a gift of land will not, of course, be enforced on proof alone of the promise to give. This is true whether the promise be oral or in writing. But where the promisee accepts the promise, enters into possession and makes improvements on the land, or does some other act on the faith of the promise which materially changes his condition, the promisor will be required to make good the gift."

The second point raised is not so easily decided. We have said:

"Courts of equity in cases of concurrent jurisdiction consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this is rather in obedience to the statute than by analogy. Hence, if the statute would bar an action at law, it will be equally a bar in equity, the mode of relief making no difference." *Hotchkin v. McNaught-Collins Imp. Co.,* 102 Wash. 161, 172 Pac. 864.

A doctrine which we in nowise modify. But in this case, while the promise was made in 1912, no time appears to have been fixed for its performance by the delivery of a deed, and at the worst a reasonable time must elapse before the statute would begin to run. Shall we say that, situated as were the parties here, related by the closest ties of blood, living but forty feet apart, and presumably associating daily in the most intimate relations, and with complete trust and confidence each in the other, the strict rule as to what would be a reasonable time as between parties dealing at arm's length should apply? However that may be, is this not rather one of those cases where the statute does not begin to run until there has been a demand for performance and a refusal? Where such a relation exists as is here alleged, it seems to us not only equitable, but logical as well, to hold that there was no breach of the promise sufficient to cause the statute to begin to run until there had been a demand and a refusal. Without such a refusal, appellants could not have been advised of the necessity of resorting to the courts to compel that which theretofore they had every reason to expect would be freely given, and in such a case as this, to hold that the statute had run its course while the appellants were still without any reason to suppose that their rights were in anywise denied or in any way jeopardized, would be to import something into the oral agreement which does not appear on the face of the complaint. In *Sayward v. Gardner,* 5 Wash. 247, 31 Pac. 761, 33 Pac. 389, this court said:

"In the case before us, the contract, which must be treated as an agreement to convey, and not a conveyance, specifies no time at which a deed should be made. The cause of action for its enforcement did not therefore accrue until after demand for the deed or the lapse of a reasonable time. According to the evidence,

Meigs made a demand for a deed from Gardner as soon as he learned where he was, and the first time he saw him after the contract was made. That was certainly within a reasonable time, and this action was begun very soon afterwards, and it follows that it is not barred by the statute of limitations. Indeed, it may be said that the cause of action did not really accrue until appellant Gardner refused, upon demand, to execute a conveyance of the property."

We conclude, therefore, that the complaint states a cause of action sufficient to call for an answer on the merits.

Reversed, with instructions to overrule the demurrer.

MAIN, C. J., MITCHELL, CHADWICK, and MACKINTOSH, JJ., concur.

[No. 14890. Department Two. January 6, 1919.]

J. A. McGILLIVRAY, *as Bremerton Iron Works, Respondent,* v. COLUMBIA SALMON COMPANY, *Appellant,* H. LOVELAND, *Defendant.*[1]

PARTNERSHIP (55)—ACTIONS—CAPACITY TO SUE—ASSUMED NAMES—STATUTES. Rem. Code, §§ 8369-8373, providing for the filing of certificates by persons doing business under an assumed name, and forbidding the maintenance of an action without alleging and proving such filing, is sufficiently complied with by pleading and proving the filing before commencement of the trial.

SAME (20)—FIRM NAME—RIGHT TO USE—STATUTES. The filing of a certificate of an assumed name is not required of one doing business in the name of a company containing his full name as proprietor, he being the only person interested therein, in view of Rem. Code, § 8372, providing that nothing in the act shall prevent the lawful use of a partnership designation if the same includes the real names of all the parties interested.

ASSIGNMENTS (29)—ACTIONS—BY ASSIGNEE. An assignment in writing for the purposes of collection authorizes a recovery in the

[1]Reported in 177 Pac. 660.

name of the assignee that would bar any further recovery against the debtors.

Guaranty (9)—Construction of Contract—Extent of Liability. Where parties for whom boats were being built took over the work upon the inability of the builder to complete his contracts, agreeing to pay all debts for material and labor, and credit was thereafter extended on the faith thereof, the indebtedness became the joint and several indebtedness of the builder and promisor for which both were liable.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered February 16, 1918, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

Jones & Riddell, for appellant.

F. W. Moore, for respondent.

Holcomb, J.—The facts in this case, found by the trial court and supported by competent evidence, may be briefly stated: One Loveland, doing business under the name and style of the Loveland Boat Works, at Bremerton, entered into a written contract to build certain boats and some tenders for the Columbia Salmon Company, a corporation, and the Alaska Pacific Herring Company. The Loveland company proceeded with the construction of the boats for both companies until the Port Blakely Mill Company, on account of the financial straits of the Loveland company, became anxious about payment for the lumber it was furnishing for the boats. In a discussion of this matter at the Columbia Salmon Company's office on May 12, 1917, it was agreed that the latter would protect the Port Blakely Mill Company upon its lumber bills in building the appellant's boats, and also a certain other account. After these accounts had been arranged, Loveland stated that he had not paid his last pay-roll; that there was a margin of about $1,400

in the contracts, and the unpaid pay-roll was about $500. The appellant gave Loveland a check for $750 to pay the pay-roll for the preceding week. It was also agreed that, from that time on, the Alaska Pacific Herring Company and the appellant would each pay the amount of its pay-rolls. From about May 12, 1917, appellant took over the plant so far as the construction of its boats was concerned, paid the pay-rolls, paid certain debts for material, paid Loveland wages instead of completing the construction contract with him, and, through its superintendent, assured respondent and one Robertson, a creditor for material, that their bills would be paid. Robertson and McGillivray, being informed that appellant agreed to pay all debts, continued to perform labor and furnish material for the boats. Robertson assigned his claim to McGillivray for collection. Respondent was doing business under the business name of "Bremerton Iron Works, J. A. McGillivray, Proprietor," thereby using both an assumed name and his own true and full name. In his complaint respondent failed to allege that he had complied with the law requiring the filing of a certificate of assumed business name with the county clerk. Appellant demurred to the complaint for the reason, among others, that the complaint shows upon its face that plaintiff has no legal capacity to sue. Thereafter respondent filed a certificate of assumed business name and pleaded the same by supplemental complaint. The demurrer was overruled after the filing of the supplemental complaint.

Rem. Code, §§ 8369-8373, provides that, before a person or persons conducting business under an assumed name may maintain a suit in any court of this state, it must be alleged and proved that such person or persons has or have filed a certificate of the true

name or names of the persons conducting such business. In such case, proof of filing the certificate is made as much a prerequisite and a material fact in maintaining the suit as proof of any other necessary fact.

In the case of *Sutton & Co. v. Coast Trading Co.*, 49 Wash. 694, 96 Pac. 428, we held that a contract made by a partnership doing business under an assumed name was not invalidated by the statute in question. In *Malfa v. Crisp*, 52 Wash. 509, 100 Pac. 1012, we held that, where copartners did business under an assumed name other than the true name of the firm members, without filing the certificate required by the above statutes designating their true names, there is such a substantial compliance with the statute as to prevent a dismissal of the action commenced before the filing of the certificate, where long before trial they filed the certificate and obtained leave to amend their complaint, which amendment was made before the statute of limitations had run against their action and after answer by the defendants, who did not stand upon the demurrer, inasmuch as the defendants were not prejudiced thereby. In *Merrill v. Caro Inv. Co.*, 70 Wash. 482, 127 Pac. 122, we held that a person conducting a business in which he alone is interested, in the name of a company containing his full name, is exempt from filing with the county clerk the designation of the firm with the true and real name of all persons conducting the business or having an interest therein, because the statute, § 8372, provides that nothing in the act shall prevent the lawful use of a partnership designation if the same includes the true and real name or names of all the parties conducting such business or having an interest therein.

Appellant urges that the cases above cited were er-

roneous and should now be overruled. We see nothing in any of them tending to discredit the reasoning in each of them, but consider them to be rather well reasoned decisions. At any rate, they are *stare decisis* and we are not now inclined to overrule any of them. The case at bar seems to be within the spirit of the decision in *Merrill v. Caro Inv. Co., supra.* Since in this case McGillivray did business in his own name as proprietor of the Bremerton Iron Works, such cannot strictly be said to be an assumed name. He was rather doing business under his own name, as well as under an assumed name. No one could be deceived or in doubt as to whom he did business with. Appellant's first two assignments are therefore without merit.

It is next contended that the trial court erred in rendering judgment in favor of respondent upon the second cause of action, being that for the material furnished by C. S. Robertson & Company, urging that the action was dismissed upon request of the respondent himself by the trial court, for the reason that no assignment of any kind of the cause of action claimed by Robertson & Company was ever proven, but the contrary was proven, and that the court dismissed that cause of action from the case, but later rendered judgment in favor of respondent upon this second cause of action.

The record shows that, upon the trial of the case, respondent testified to a lack of knowledge or recollection of the assignment of the Robertson claim to him for the purpose of collection, and his counsel made a motion for nonsuit as to the Robertson claim, which of course, the court announced it would grant; that counsel immediately requested and received permission to withdraw the motion, and no order or minute entry was ever made nonsuiting the Robertson cause

of action. Counsel for appellant asked: "Will we try both cases?" to which counsel for respondent replied: "We will try them just the same as if he had not testified." The assignment of the Robertson claim was duly offered and admitted in evidence by the court. The court rendered judgment in favor of respondent, both upon his own claim and upon the Robertson claim assigned to him for collection.

While respondent probably forgot the assignment of Robertson to him for the purpose of collection in order that the two claims might be collected in one suit, the assignment in writing being proven, it is too well settled in this state that an assignment for the purpose of collection assigns sufficient interest to sue and recover to need any citation. The recovery upon such proven assignment bars any other or further recovery against the debtor.

It is next contended that the trial court erred in granting judgment upon the first cause of action, McGillivray's, for the reason that his own testimony shows that the only credit given by respondent for the materials for which he seeks recovery was the credit to Loveland, against whom this judgment runs, and not a credit to appellant.

The trial court found that the indebtedness created after the meeting of May 12, 1917, was the joint and several indebtedness of both appellant and Loveland, that the credit was extended to both, and that both were liable. Under the facts shown, this was correct, and we see no reason to disturb the judgment.

Judgment affirmed.

MAIN, C. J., PARKER, MOUNT, and FULLERTON, JJ., concur.

[No. 14902. Department One. January 6, 1919.]

WOOLWORTH COMPANY, *Appellant*, v. THE CITY OF SEATTLE, *Respondent*.[1]

MUNICIPAL CORPORATIONS (473, 479)—DEFECTIVE SEWERS—ACTIONS FOR INJURIES—CONTRIBUTORY NEGLIGENCE. There can be no recovery for damages from flooding and injury to goods, where the loss was due to the concurrent negligence of the city in the maintenance of sewers of insufficient capacity to carry off an average rainfall, and the contributory negligence of the owner in failing to keep clean and in proper repair a back water valve required by ordinance in all cellar and basement drains.

EVIDENCE (92)—TRIAL (16)—ADMISSIONS BY AGENT. An admission stated to the court by plaintiff's general manager, made during the trial to clear up some confusion in his testimony, is binding upon the plaintiff.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 22, 1918, upon findings in favor of the defendant, upon granting a nonsuit, in an action in tort. Affirmed.

Leola May Blinn, for appellant.

Hugh M. Caldwell and *James A. Dougan*, for respondent.

MITCHELL, J.—Appellant, plaintiff below, was engaged in the mercantile business in the Arcade Building, in Seattle. In addition to its salesroom, it occupied the basement underneath for the storage, receiving, checking and shipping of its merchandise. It was a tenant of the premises, the basement of which abuts upon University street. The city maintained a sewer in University street. Radiating from this sewer there was a lateral sewer from and accommodating the premises used by appellant. On March 5, 1917, there was an average heavy rainfall, when

[1]Reported in 177 Pac. 664.

the basement became flooded, causing damage to appellant's goods and merchandise which, together with the cost of removing and cleaning the same, amounted to the alleged sum of $448.56. Charging the city with negligence in maintaining a main sewer on University street inadequate to meet the burden imposed upon it, resulting in the damage referred to, appellant presented to the city its duly verified claim for damages, the rejection of which occasioned this action. The city, by its answer, denied liability, and affirmatively answered, alleging contributory negligence. The case was tried without a jury. At the close of plaintiff's case, the court granted defendant's motion for a nonsuit. Upon the request of defendant, findings of fact were made, upon which a judgment of dismissal was entered. Plaintiff appeals from the judgment.

On the date mentioned, and for some years prior thereto, there was in force an ordinance of the city which, *inter alia,* provides:

"All cellar and basement drains must, when connected to sewer, . . . be protected from backwater by backwater valves; said backwater valves must be provided with an air-tight clean-out cover placed immediately above valve, either screwed or bolted in place, capable of being removed for examination or repairs." Ordinance No. 22,839, § 32.

In the basement there was installed an iron manhole or receiving water tank, some two feet deep and about the same in diameter, narrower at the top, on which was placed, flush with the floor, a latticed circular iron cover having a mesh about two inches square. Within the manhole the intake of the drain pipe formed an elbow, the end of which, turned down and submerged in water when in place, was below the bottom of the stem of the drain pipe, thus forming a trap to prevent odors escaping from the sewer. On

the stem of the pipe near the elbow and within the manhole there was constructed a backwater valve and cover as provided by the ordinance of the city. The drain pipe ran into a larger one from the building and thence into the University street main sewer. The water that flooded the basement poured back boiling out of the manhole.

It is the contention of appellant that the incapacity of the main sewer alone caused the flooding, while the respondent claims the backwater valve had been allowed to become unclean and clogged by the fault of appellant, thus causing the flooding and damage. The trial court found the main sewer inadequate, to which the city took no exception, and also found the appellant negligent in not keeping the backwater valve clean and in proper repair, to which appellant excepted. There is no testimony to show the backwater valve was structurally insufficient or out of repair.

There was ample testimony by the head janitor, superintendent, and assistant superintendent of the building, and by E. M. Barstow, manager of appellant's mercantile business in Seattle, all of whom witnessed the flooding, to justify the finding that all the water which caused the damage backed up from the street sewer through the drain pipe and manhole into the basement.

On the other hand, C. A. Davis, appellant's witness, a plumber and member of the firm that put in the plumbing, testified in detail as to its construction and operation, using a backwater valve to illustrate and explain its proper purpose and functions. It appears the backwater valve consisted of a solid door which hung vertically inside the drain pipe from a hinge, and when undisturbed rested against the surface of a circular collar or shoulder. Water escaping from the basement through the manhole and drain pipe would

have no trouble in causing the door of the backwater valve to yield, while water backing up the drain pipe would force the door of the backwater valve against the shoulder and thus prevent the further passage of water, assuming always there is no debris or trash to clog the proper operation of the door of the backwater valve. The plumber stated that, if the door to the valve were free, backwater from the sewer could not pass—the harder the pressure from that direction all the better, if possible, to prevent the backwater from passing. Appellant attempted to meet the force of this testimony by showing the basement floor was cleaned at the end of each day's work; but considering the manner in which the backwater valve was constructed, and the further fact that there was no fine screen over either the manhole or the intake of the drain pipe, nor other device to prevent debris from getting into the valve, the flooding backward from the sewer is explainable on no reasonable theory other than that the door to the valve had been rendered useless by reason of carelessness in permitting waste matter to get into and clog the door of the backwater valve.

Counsel for appellant also contends that a part of the flood water or sewage came back into the basement through the toilet. We do not so understand the proof. The rear of the basement was fifteen inches higher than that where the flood occurred. The toilet was situated in the rear basement, but all the witnesses who testified on this point said the damage was done by water pouring back through the manhole in the lower basement. The evidence does not show how the plumbing was constructed from the toilet into the sewer. One witness only, E. C. Barstow, testified there was backwater through the toilet, but the record

shows that, later in the trial, when another witness was being examined with reference to this, Mr. Barstow, to clear up some apparent confusion, stated to the court: "Water came from the toilet but did no damage in the basement. This damage all came through the manhole." Counsel for appellant argues that Mr. Barstow was not testifying when the statement was made. Appellant is bound by the statement, however, as an admission during trial, for Mr. Barstow was general manager for appellant in the conduct of the business which had suffered the loss, and was such manager and agent at the time of the trial.

The finding of negligence against the respondent is unchallenged. The evidence preponderates in support of the finding of contributory negligence on the part of the appellant. The two acts of negligence concurring and co-operating constituted the proximate cause or occasion of the damage complained of, thus precluding a recovery. *Franklin v. Engel,* 34 Wash. 480, 76 Pac. 84; 20 R. C. L., Negligence, §§ 88, 89.

Judgment affirmed.

MAIN, C. J., MACKINTOSH, and TOLMAN, JJ., concur.

[No. 14907. Department One. January 6, 1919.]

THE STATE OF WASHINGTON, *on the Relation of Homer M. Hill, Respondent,* v. PORT OF SEATTLE *et al., Commissioners of said Port District, Appellants.*[1]

MUNICIPAL CORPORATIONS (22, 23) — GOVERNMENTAL POWERS — AUTHORITY TO MANUFACTURE ICE. Laws of 1917, p. 498, § 1, empowering port districts to maintain and operate "warehouses, storehouses, elevators, grain-bins, cold storage plants, terminal icing plants . . ." authorizes the manufacture and sale of ice only as connected with the general scheme of its public business as a warehouseman for preserving shipments cared for or shipped at its docks and terminals; and does not grant power to build a plant and engage in manufacture largely in excess of its needs and to sell to others engaged in retailing ice.

SAME (22). Such power cannot be sustained on the theory that it may build in reasonable anticipation of future needs, where it built deliberately in excess of any demand that might be made within any reasonable future time, especially in view of the fact that ice plants can be built in units and added to as necessary.

SAME (22). Ice is not a by-product of a cold storage plant, notwithstanding the ice manufacturing machinery may be run by the same power as the refrigerating plant.

TOLMAN, J., dissents.

Appeal from a judgment of the superior court for King county, Frater, J., entered January 10, 1918, upon findings in favor of the plaintiff, in an action for an injunction, tried to the court. Affirmed.

C. J. France, for appellants.

Robert A. Devers and *Piles & Halverstadt,* for respondent.

CHADWICK, J.—In *State ex rel. Hill v. Bridges,* 87 Wash. 260, 151 Pac. 490, we held that the port district might build and operate an ice manufacturing and cold storage plant as an incident to its business of

[1]Reported in 177 Pac. 671; 180 Pac. 137.

warehousing. In the beginning, the power of the port district to manufacture and sell ice in the market as a commodity was raised. To forestall the question, the port district passed a resolution in which it disclaimed any such intention, saying, *inter alia,*

"It is not the purpose or intention of the commission to sell this ice, but to furnish it to fishermen at the fish storage warehouse and to charge a rate of so much per pound for the use of the warehouse storage, which charge will include the ice furnished."

The intent of the resolution being to clearly proclaim that the commission would use its product to pack, recondition, preserve and re-ice for shipment such fish as might be brought to its docks.

The case was carried on to final decree, this declaration being a deciding, if not a controlling factor, in the final decision of the court. At the following session of the legislature, the commissioners prepared and caused to be enacted an amendment to the act defining its powers. As abridged for the purposes of argument by counsel for appellant, the amendment is as follows:

"All Port Districts . . . are hereby authorized . . . to lay out, construct, condemn, purchase, acquire, add to, maintain, conduct and operate, any and all systems of . . . wharves, docks, . . . warehouses, storehouses, elevators, grain-bins, cold storage plants, terminal icing plants, bunkers, . . . together with modern appliances for the economic handling, storing, and transporting of freight and handling of passenger traffic, and other harbor improvements, rail and water transfer, and terminal facilities within such port district." Laws of 1917, p. 498, ch. 125, § 1.

Under the license of this amendment, as construed by counsel for the port district, the commissioners have—

(a) Manufactured and sold ice to railroad and ex-

press companies for the purpose of icing refrigerator cars to transport perishable commodities out of the city of Seattle, although the shipments originate at other docks and warehouses.

(b) To railroad companies and express companies to carry into the interior and into other states for the purpose of refrigerating cars to carry perishable commodities into the city of Seattle, and without reference to the dock, warehouse or wharf at which the shipments are to be discharged.

(c) To steamboat companies for the purpose of icing and preserving perishable commodities carried by vessels departing from the city of Seattle.

(d) Cracked ice to fishing boats bound for the fishing grounds and banks, to preserve fish until they are brought into port and placed in cold storage or reconditioned.

(e) To fishermen and to those engaged in packing fish brought by fishing vessels to the city of Seattle and handled and stored at the port district's docks at the east waterway.

(f) To fish packers and brokers, and other persons engaged in handling other perishable commodities, on various docks and piers within the city of Seattle.

(g) To others engaged in selling ice at retail in the city of Seattle.

As an incident to its business of cold storage or refrigeration, the commissioners put in an ice making plant. We say incident, for ice can be manufactured with the same power and the same crew, and, possibly, with the same liquids. This, as we take it from a general view of the record, may be of either greater or less capacity, depending upon the number of cans or plates the manufacturer sees fit to install.

The commission installed a plant having a capacity of 15,000 tons per year, which is largely in excess of

the present needs of the port district. The commission built up to the capacity of the machinery of the cold storage plant without reference to its needs as outlined by its resolution aforementioned; that is, to store, to recondition and repack for reshipment fresh fish brought to its own warehouses.

Relator brought this suit to enjoin the commissioners, and a temporary restraining order holding appellants generally to a limit of power consistent with the disclamatory resolution was issued. When the case came on for hearing on its merits, the court held that the temporary order should be made permanent, with some exceptions not necessary to mention here.

It cannot be denied that the appellant port commission is manufacturing far beyond its needs as a warehouseman, and doing a general commercial business in the manufacture and the sale of ice in the particulars mentioned.

Counsel for appellant ground their appeal on the amendment of 1917. In the words "terminal icing plants" they find justification for the doing of all of the things complained of.

Witnesses were sworn to testify on either side as to the meaning and comprehension of the term. They ran true to the form of expert witnesses and differed widely in their conclusions. Those offered by the appellant were generally of the opinion that the words mean that the appellant might do anything in the way of a business in ice that would promote the business of the port of Seattle, not the business of appellant corporation the "Port of Seattle" alone, but of everyone engaged in business in the city of Seattle and the county of King, and it is so earnestly contended here.

Whatever meaning may be given to the abstract phrase "terminal icing plant," we are sure that the meaning given it by appellant cannot be sustained.

For our purposes it must remain in its setting and sustain its true relation in context. The amendment pertains strictly to the business of the appellant, it may "maintain, conduct and operate warehouses, storehouses, elevators, grain-bins, cold storage plants, *terminal icing plants,* . . . together with modern appliances, etc., . . . and terminal facilities within such port district," as a grant of power to engage in private business away from, or in no way connected with, the general scheme outlined in the act creating the port district and the amendment of 1917.

The business of the port in receiving, icing, reconditioning, and packing fish for reshipment at its wharves, docks and warehouses is in aid of its public function, although done in a proprietary capacity. When it goes beyond the bound of its public engagement to take care of such business as does not naturally come to its terminals it ceases to be a public functionary. It is then engaged in a strictly private business, and for that there is no warrant in the law, either by express enactment or by implication, for the rule of construction is that any doubt as to the power of a municipal corporation must be resolved against the municipality—only such powers as are expressly granted, or such as are necessarily incident to its granted power, will be sustained, for the policy of the law has always been to limit, rather than to extend, the proprietary functions of a municipal corporation. *State ex rel. Hill v. Bridges,* 87 Wash. 260, 151 Pac. 490; *State ex rel. Huggins v. Bridges,* 97 Wash. 553, 166 Pac. 780.

That it was not the intention of the legislature to invest the port commissioners with a general power to do business away from its docks and terminals and wheresoever it pleased in the city of Seattle or in

King county, and which might ultimately ripen into a monopoly and work to the destruction of private business or the business of other quasi public corporations, was held in *State ex rel. Huggins v. Bridges, supra,* where we had the phrase "rail and water transfer and terminal facilities" to construe. The port district maintained that it had a general, or at least an implied power, to carry on a transportation business as a common carrier. Answering its argument, we said:

"We are asked by appellants to define what is meant by the words 'rail and water transfer and terminal facilities.' It might be answered that it is sufficient to determine what powers are granted this municipal corporation by the clear intendment of the act or by necessary inference, and that nowhere is it granted the power to construct, operate and maintain railway lines, either terminal, belt, or otherwise, and to act as such a common carrier. But we conceive that the language referred to simply means such adjuncts and appurtenances as are necessary or convenient for the transshipment of commodities between land carriers and water carriers."

And in accord with the rule of construction thus laid down, we held that the port district has only such powers as are "indispensable to the declared objects and purposes of the district."

Counsel's argument rests upon an assumption, oft repeated and as many times assumed, that the port district is the city of Seattle and King county, and whatever is done by it within these limits and which may affect the inhabitants of these political subdivisions is within its power to maintain "terminal icing plants." Geographically and as a unit for bonding or taxation to meet money demands, the port district is King county, but as a business corporation, the activities of the port district are limited to its own

field of endeavor as outlined by the act creating it and by its necessary implications. It has no concern with business other than that which comes to it, or that may be brought to it by the offering of better service and facilities, and if it undertakes to serve other "industrial plants, docks, piers and terminals" it may be challenged, as was done in the *Huggins* case.

Many cases are cited to sustain the theory that a municipal corporation may dispose of its surplus product, whatever the character of the product may be; electricity, water, and even a surplus of room in public buildings. The latest expression of this court upon this doctrine will be found in *Chandler v. Seattle,* 80 Wash. 154, 141 Pac. 331. But to pursue this question would be idle, for although now well established in our own cases, and generally throughout the country, it is not controlling of the case at bar. The decree of the court saves to appellant the right to dispose of all ice manufactured in excess of the reasonable requirements of its own business.

It is also argued that, if a city can build in anticipation of future needs, or build to sustain a peak load at certain hours or at certain seasons, and having thus a surplus, it may dispose of it in the market, and since appellant has built a plant capable of manufacturing a commodity in excess of its present needs, it should be permitted to dispose of it likewise. But the rule relied on is born of the facts in the particular case. The facts are not born of, neither can they demand as of right that they be adopted by, the rule.

The power to sell a surplus product by a municipal corporation is allowed only where the municipality has built in reasonable anticipation of its future needs, or, as in the *Chandler* case, dammed or curbed the

whole of a stream to meet proper engineering conditions, or has a variant surplus in excess of its needs from day to day, but created with reasonable expectations of using it for its own purposes. The fault here, and we understand it to be frankly admitted, is that the appellant was not bound to build the whole to attain the part that it would need in the prosecution of its own affairs. It deliberately built a plant knowing that it had a capacity far beyond its present demands, and beyond any demand that might be anticipated within any reasonable future time. It built to manufacture at will, with the expectation of selling ice as a commodity, and not as an incident to its business or its present or reasonably prospective engagements with its patrons.

It was not bound to build as it did, for it was understood by the commissioners, as it is of all men, that an ice plant can be built in units and added to as necessity required.

Finally, it is said that ice is a by-product of the cold storage business, and that the power to sell should follow to the end that waste should not follow. But ice is not a by-product of a cold storage plant. If, in the refrigeration of a warehouse, ice is formed and machinery could be installed to save it, we might well say that it is a by-product, but where ice manufacturing machinery is installed, although it is to be run by the same power as the refrigerating plant, it is no more a by-product than a steam heating system, a light system, or any other contrivance that may be operated with the same power would be.

We conclude, therefore, that appellant's powers are limited by the terms of the act creating it and its necessary implications, and that it has no power to manufacture and sell ice to meet any market other than the

reasonable demands of its own business, which is to care for, preserve and pack for reshipment such perishable products as may be received, cared for, or shipped out of its terminals, and that in all other things it should be restrained; providing, however, that it may, without violating its restraint, dispose of any excess of ice manufactured in a *bona fide* attempt to manufacture only so much ice as may be reasonably required by it for the freezing, conditioning, reconditioning, packing, icing, re-icing, and preserving products handled at its cold storage and terminal icing plants, docks, and warehouses.

The judgment entered by Judge Frater is affirmed with the modifications called for by this opinion, the legal effect of the same being to revive the temporary restraining order and to eliminate the modifications made therein by the judgment appealed from.

MAIN, C. J., MACKINTOSH, and MITCHELL, JJ., concur.

TOLMAN, J. (dissenting)—I cannot agree to the conclusions reached by the majority. The law, chap. 125, Laws of 1917, p. 498, § 1, contemplates that the port commission shall use its own judgment as to the needs of its district, present and prospective, and shall lay its plans and construct its plants according to what, in its judgment, the business of its port may require immediately or in the not distant future, and so long as the commission acts in good faith, its judgment should be supreme, and the courts should not undertake to interfere therewith. I find no evidence in the case showing, or tending to show, that the port commission acted otherwise than in good faith in building its ice manufacturing plant in anticipation of its future needs. And having constructed its plant in good faith in such anticipation of future needs, it should, in the interest of efficiency and economy, be permitted

to operate its ice plant to capacity and keep its equipment busy, in order to reduce the cost of manufacturing to the lowest point possible, and should be permitted to dispose of its surplus on the market, notwithstanding possible competition with private concerns engaged in the ice business, free from any interference by the courts.

Under the authority of *Chandler v. Seattle*, 80 Wash. 154, 141 Pac. 331; Dillon, Municipal Corporations, § 1300; *Gottlieb-Knabe Co. v. Macklin*, 109 Md. 429, 71 Atl. 949, 31 L. R. A. (N. S.) 580, and the cases there cited, the judgment of the trial court should be reversed, and the cause dismissed for want of equity.

[No. 14927. Department One. January 6, 1919.]

WILLIAM JACKSON, *Respondent*, v. S. C. WHITE *et al.*, *Appellants*.[1]

VENDOR AND PURCHASER (53, 162)—RESCISSION BY VENDOR—REMEDIES OF PURCHASER—RECOVERY OF PURCHASE MONEY. Where a contract for the sale of land upon which $500 was paid contained no clause with reference to forfeiture or liquidated damages, and the vendor, pending negotiations as to the title, sold part of the land to another, the contract is thereby rescinded and the purchaser is entitled to recover the purchase money paid, with interest.

SAME (147, 157)—REMEDIES OF VENDOR—DAMAGES. Where the vendor rescinds the contract and sells part of the land to another, his damage for loss of the bargain must be alleged and proved as any other fact.

SAME (171)—REMEDIES OF PURCHASER—RECOVERY OF PRICE—DEFENSES. The vendor, on rescinding, cannot claim forfeiture and liquidated damages not provided for in the contract, and the same constitutes no defense or counterclaim to an action by the buyer to recover purchase money paid.

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered May 6, 1918, upon

[1]Reported in 177 Pac. 667.

findings in favor of the plaintiff, in an action to recover money paid on a contract for the sale of land, tried to the court. Affirmed.

W. W. Langhorne, for appellants.

A. E. Rice, for respondent.

MITCHELL, J.—On October 6, 1917, S. C. White, for himself and wife, entered into a written contract with William Jackson for the sale of real estate in Lewis county. The contract was signed by both parties. It did not contain any clause with reference to forfeiture or liquidated damages. In effect, it provided that White sold, and agreed to transfer by warranty deed to Jackson, seventy-eight acres of land, which is described, for $10,500. Five hundred dollars was paid in cash. Jackson was to give a mortgage on the property for $3,500, and the balance, $6,500, was to be paid upon delivery of the deed at the bank in Chehalis on October 9, 1917. Title to the land was to be merchantable or $500 returned. Possession was to be given November 1, 1917. Abstract was furnished on date of the contract.

Under legal advice, Jackson found fault with the title as disclosed by the abstract, and so reported in detail to White on October 9, 1917. White confessed the defect and promised to correct it. A few days later he called Jackson's attention to another deed he had gotten, which was not satisfactory to either party. Still further effort was made by White to correct the title. On October 22, 1917, Jackson declined to wait longer for completing the title, and demanded of White the return of the $500 cash payment, which demand was refused. On the same day and at the same time, White offered to Jackson deeds of conveyance, one of which he had just received, claiming they were suffi-

cient, and demanded that Jackson perform his part of the contract. Jackson contended the deeds were not adequate to correct the defect complained of, and refused to perform. On October 24, 1917, White wrote, and Jackson received, a notice as follows:

"Chehalis, Washington, Oct. 24, 1917.

"William Jackson,

"Chehalis, Wash.

"Dear Sir: Complying with your agreement with me for the purchase of the Goetz Farm, I have deposited full warranty deed from myself and wife to you and wife, made by us Oct. 9, 1917, together with the $3,500 which I was to loan you, accompanied by a note and mortgage to be executed by you and wife for this money; completed abstract is also deposited there, showing complete merchantable title, and ask that you complete your part of the agreement to purchase the Goetz Farm by assignment of certificates of deposit under the terms of the agreement.

"Am willing to meet yourself and attorney at any time not later than Monday, Oct. 29, 1917, at 3 p. m., at the Security State Bank at Chehalis, Wash., to complete the matter with you, after which I shall conclude that you rescind the contract and forfeit the $500 paid as a deposit and applied as liquidated damages for noncompliance. Respectfully yours,

"S. C. White."

The deed of conveyance referred to in the notice was the same one refused by Jackson on October 22, 1917. Jackson did not comply with the terms of the notice. On November 1, 1917, White and wife disposed of thirty-eight acres of the land to a third party. Thereafter Jackson instituted this action to recover the $500 cash payment. White and wife resisted the suit by an answer of denials and an alleged affirmative defense, setting up an offer antedating suit to perform on their part, and failure on the part of Jackson to perform, together with a claim of forfeiture of the $500 on ac-

count of the failure to comply with the terms of the written notice of October 24, 1917. In their answer they do not offer to comply with the terms of the contract of October 6, 1917, and demand performance on the part of Jackson, but content themselves with claiming and demanding judgment for the $500 as liquidated damages and forfeiture. Indeed, at the trial of the case, White and wife, by their attorney, admitted: "Defendant admits that he isn't now, and hasn't been since the first day of November, 1917, in a position to convey to the plaintiffs in this action more than 40 acres of the original 78."

The cause was tried without a jury. The court entered findings, conclusions and judgment in favor of plaintiff. Defendants appeal. The question, so much discussed by counsel on both sides, as to whether the title tendered by appellants was a marketable one or not has become immaterial because of the conduct of the parties and the pleadings in the case. Demands and counter-demands had been made by each, when, on November 1, 1917 (respondent never having been put in possession of the property), appellants sold about one-half of the land to a third party, thus rendering themselves unable to comply with the contract of October 6, 1917.

The contract being at an end, at least by virtue of appellants having sold about one-half of the land, the respondent then had the right to recover the money paid thereon, together with interest at the legal rate. *Jones v. Grove,* 76 Wash. 19, 135 Pac. 488. Again, it is said in the case of *Jones v. Grove,* as follows:

"Where a contract for the sale and purchase of real estate has been rescinded, the law restores each of the parties to his original status. The vendor is entitled to the possession of the property if it has not already been restored to him, the rent if any, and dam-

ages for the breach. The purchaser has a right to the refund of the money paid under the contract, together with interest. *Maffet v. Oregon & C. R. Co.*, 46 Ore. 443, 80 Pac. 489; *Bernardo v. Soderman*, 19 Cal. App. 161, 124 Pac. 866; *Pedley v. Freeman*, 132 Iowa 356, 109 N. W. 890, 119 Am. St. 557; *Lytle v. Scottish American Mortgage Co.*, 122 Ga. 458, 50 S. E. 402."

Even if it be admitted that appellants were in no way at fault at the expiration of the time fixed in the notice of October 24, 1917, requiring respondent to perform, and that appellants had the right to sell, and did sell, the land or a substantial part thereof, then,

"The rule in such cases is, that the vendor has a right to the fruits of his bargain and is entitled to compensation for any loss he may suffer by reason of its nonconsummation. What his damages are in such circumstances must be alleged and proven like any other fact in the case." *Hogan v. Kyle*, 7 Wash. 595, 35 Pac. 399, 38 Am. St. 910.

The rights of the parties were in no way affected by the written notice of October 24, 1917, with reference to forfeiture of the $500 as liquidated damages. The attempted assertion of rights thereunder constituted no defense or counterclaim to the cause of action. Appellants not having alleged or proved any damages, the action was rightly determined.

Judgment affirmed.

MAIN, C. J., MACKINTOSH, TOLMAN, and CHADWICK, JJ., concur.

[No. 14929. Department Two. January 6, 1919.]

THE STATE OF WASHINGTON, *on the Relation of John P. Kiggins et al., Appellants,* v. G. S. HADLEY, *Police Justice of the City of Camas, Clarke County, Respondent.*[1]

JUDGMENT (36)—DEFAULT—VACATION—DISCRETION. The vacation of a default judgment rests in the discretion of the trial court, and it is not an abuse of discretion to vacate a default writ of prohibition if erroneously granted.

MUNICIPAL CORPORATIONS (333)—VIOLATION OF ORDINANCE—JURISDICTION—POLICE COURT—VENUE. Rem. Code, § 1756, requiring actions to be brought in justice court in the city or town where one or more of the defendants reside has no application to a prosecution for the violation of an ordinance of a city of the third class, jurisdiction of which is exclusively vested in the police judge of the city by Id., § 7671-29.

SAME (333)—JURISDICTION—POLICE COURT—CONTINUANCE. A police judge in cities of the third class does not lose jurisdiction of a criminal proceeding for the violation of a city ordinance by a continuance for more than sixty days, under Rem. Code, § 1847, which applies only to civil actions; in view of the fact that Rem. & Bal. Code, § 7700, providing that proceedings before police justices shall be governed by general laws was expressly repealed by Rem. Code, § 7671-35, conferring exclusive jurisdiction upon police justices in such cases.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered May 18, 1918, in favor of the defendant, dismissing an application for a writ of prohibition, upon sustaining a demurrer to the affidavit. Affirmed.

George O. Davis, for appellants.

John D. Currie, for respondent.

HOLCOMB, J.—Appellants sought a writ of prohibition in the superior court of Clarke county, to prohibit the police judge of Camas, Washington, a city

[1]Reported in 177 Pac. 655.

of the third class, from proceeding against relators for the recovery of a penalty in the sum of $300, for an alleged violation of one of the criminal ordinances of the city. This appeal arises out of the same case as that decided in *State ex rel. Kiggins v. Woolson*, 98 Wash. 505, 167 Pac. 1088. Thereafter, on January 10, 1918, defendants answered the complaint and filed the answer with Kelley Loe, who had succeeded Woolson as police justice. Both parties endeavored to have the case set for trial, but were unable to do so until G. S. Hadley was appointed police judge. He set it for trial April 18, 1918. Appellants then appeared and moved for the dismissal of the action on the grounds that the defendants were residents of a third class city having a population of more than 3,000, and that the action should have been begun in the precinct in which they resided; and that the police court lost its jurisdiction by reason of having continued the case more than sixty days. This motion being overruled, appellants applied to the superior court for an alternative writ of prohibition requiring the police judge to show cause on April 29, 1918, at 9:30 a. m., why the writ should not be made permanent, prohibiting the police judge from proceeding further with the case.

On April 29, 1918, appellants' attorney obtained a default, and a permanent writ of prohibition issued and was served the same day. Respondent's attorney appeared a few minutes after the default had been entered. Some hours later, on the same day, respondent moved the court for the vacation of the default, and filed a demurrer to the affidavit in support of appellants' motion for writ of prohibition. Appellants demurred to the affidavit in support of the motion for vacation of default judgment, which demurrer was overruled. The motion to vacate was

granted, the demurrer to the affidavit for the writ of prohibition was sustained, and appellants' motion for a permanent writ was denied.

Appellants assign that the court erred in vacating the permanent writ of prohibition, sustaining respondent's demurrer to relators' application for the writ, and overruling relators' demurrer to respondent's motion and affidavit to vacate the permanent writ of prohibition.

If the police justice had jurisdiction of the action, the granting of the writ of prohibition would have been erroneous. The vacating of default judgments rests within the sound discretion of the court, which here does not manifestly appear to have been abused. If the police justice had lost jurisdiction, the judgment denying the peremptory writ of prohibition by the superior court is wrong.

Appellants' first contention, that all civil actions commenced in a justice court against a defendant or defendants residing in a city or town of more than 3,000 inhabitants shall be brought in the justice court in the city or town in which one or more of such defendants reside, as provided in Rem. Code, § 1756, is untenable in this case. We may concede that this is the law in civil actions commenced in justice courts, but the action at bar was one for a violation of a city ordinance, a penal and quasi criminal action, the exclusive jurisdiction of which is conferred by § 7671-29, in cities of the third class, on the police judge of such city.

Appellants' other contentions are that a justice court cannot continue an action exceeding sixty days, and that, when a justice of the peace continues a case indefinitely, he loses jurisdiction. In support of these contentions, appellants refer us to Rem. Code, § 1847. The statute relied upon was construed by this court

in *Nelson v. Campbell*, 1 Wash. 261, 24 Pac. 539, and it was then held that the rule of liberal construction regarding proceedings in a justice court does not extend to questions of jurisdiction, and that, under this section (then codified as § 1769, Code of 1881), a continuance for more than sixty days divests the justice of jurisdiction, unless his docket shows consent to such continuance.

But the section applies only to civil actions, while, as heretofore stated, this is a penal action. Camas is a third class city and, as we pointed out in the former mandamus proceeding before us, cited *supra*, the law formerly in force, giving to justices jurisdiction of criminal cases arising under ordinances of third class cities, was expressly repealed. Rem. Code, § 46. And Rem. & Bal. Code, § 7700, relating to proceedings before police justices, and providing that same should be governed by the general laws relating to justices of the peace and to their practices and jurisdiction, was also expressly repealed by Laws of 1915, p. 666, § 35 (Rem. Code, § 7671-35), and, by the same act, police judges in such cities were given exclusive jurisdiction in the cases therein specified, including such as this. As the law now stands, police justices in cities of the third and higher classes are something more than justices of the peace and are not bound by the general laws regulating proceedings in justices' courts. The police court did not, therefore, lose jurisdiction of the cause by failing to bring the case to trial within the sixty-day period, and the trial court was correct in dismissing the application for the writ of prohibition.

Affirmed.

MAIN, C. J., PARKER, FULLERTON, and MOUNT, JJ., concur.

[No. 14946. Department Two. January 6, 1919.]

MARY METON, *Appellant*, v. INDUSTRIAL INSURANCE DEPARTMENT, *Respondent*.[1]

MARRIAGE (11, 14)—BY COHABITATION AND REPUTATION—PRESUMPTIONS—EVIDENCE. A presumption of lawful marriage from holding out and cohabitation cannot be indulged where the proofs show that the parties, unable to speak or read English, relied upon applications and affidavits for a marriage license which they paid for and supposed constituted a lawful marriage, no license ever having been issued or ceremony performed.

MASTER AND SERVANT (121-2)—WORKMEN'S COMPENSATION ACT—"DEPENDENTS"—"WIDOW." One who lived with deceased as his wife, believing herself to be lawfully married, is not a "dependent" of the deceased, as defined by the workmen's compensation act, Rem. Code, § 6604-3, specifying "widows" and certain relatives as within the definition.

Appeal from a judgment of the superior court for King county, Frater, J., entered January 16, 1918, affirming an order of the industrial insurance department rejecting a claim for compensation, after a hearing on the merits before the court. Affirmed.

George H. Rummens and *Jay C. Allen*, for appellant.

The Attorney General and *D. E. Twitchell, Assistant*, for respondent.

PARKER, J.—This is an appeal by the claimant, Mary Meton, under § 6604-20, Rem. Code, from the decision of the superior court for King county, affirming a decision of the state industrial insurance department rejecting and disallowing her claim made against the accident fund created under our workmen's compensation act. Her claim is made as the widow of Nick Meton, deceased, who, it is conceded, was killed while engaged in an extra-hazardous employment under such circumstances as to entitle his widow, if he left

[1]Reported in 177 Pac. 696.

one, to compensation from that fund. The only questions here presented are, Is appellant the widow of Nick Meton; and, if not, is she a dependent of him within the meaning of the workmen's compensation act?

There is no definition of the word "widow" to be found in the act, though there is of the word "dependent," apart from the word widow. It is therefore plain that the word widow, as used in the act, must be given its ordinary meaning, which is, "A married woman whose husband is dead." 3 Bouvier's Law Dictionary (Rawle's 3d Rev.), 3454.

It is conceded that appellant has not married since the death of Nick Meton, so our first inquiry is, Was appellant his lawful wife at the time of his death?

On September 21, 1911, appellant, then a widow, and Nick Meton went to the court house in Pacific county to get a license to be married, and, we may assume, with the intention of then and there being married. They are Polish people, and neither of them could then speak or understand the English language. There went with them to the auditor's office the eight-year old daughter of appellant, who acted as interpreter, as best she could, in the conversation there had between them and the deputy auditor. The deputy filled out the forms of affidavits required by Rem. Code, § 7164, to be made by each of the parties applying for marriage licenses, which appellant and Nick Meton then signed and swore to before the deputy, who thereupon so certified, attaching the official seal of the office to his certificate. There being no disinterested person present of sufficient age who could make the third affidavit, as required by Rem. Code, § 7164, as a prerequisite to the issuing of a marriage license, the deputy gave to them a form for such affidavit, informing them, as best he could through appellant's

daughter as interpreter, of the necessity of having such affidavit made by a third person, and instructing them to have the same made by some such person, and return the same to the auditor's office, when he would issue the marriage license. He then gave to them the papers, including the affidavits already made by them and so certified by him, expecting they would all be returned properly executed within a few days, when he would issue the license. At that time Nick Meton paid the fees for the issuing of the license. They then left the auditor's office, and subsequent events clearly indicate that they did not understand the import of what occurred there, apparently because of the inability of the eight-year old daughter of appellant to make plain to them what was there said by the deputy auditor. They left the auditor's office believing they were married, and continued in that belief, we assume, in good faith, up until the time of the death of Nick Meton, which occurred in March, 1917. During the whole of this period they lived together and openly held themselves out to the world as husband and wife. During this period appellant preserved the paper upon which there was partly written and partly printed the affidavits made by herself and Nick Meton for a marriage license, given to them by the deputy auditor, believing that paper was evidence of their marriage, though she never read it, not being able to do so, and apparently not considering that there was any necessity for having it read or translated to her.

While appellant's sworn statement made in her application to the industrial insurance department for compensation from the accident fund because of the death of Nick Meton, which statement we assume was made in good faith, showed that she was the widow of Nick Meton, the department not being satisfied with her showing in that behalf, required of her that she

produce a marriage certificate, or some other written evidence of her marriage to Nick Meton. In compliance therewith she produced the paper upon which the affidavits of herself and Nick Meton appeared, which had been given to her by the deputy auditor when they applied for a marriage license, and which she had preserved in the belief that that paper was evidence of her marriage to Nick Meton. It is plain from the evidence that no marriage license was ever issued, that no ceremony of any nature was ever performed, and that no marriage certificate was ever issued by anyone purporting to evidence their marriage.

If a marriage agreement could be lawfully made and the marriage status created in this state as at common law, it is quite probable that appellant and Nick Meton should be held to be husband and wife at the time of his death. It has, however, become the settled law of this state that the marriage status cannot be legally so created, it being necessary to comply with our statute law in order to lawfully create such status. *In re McLaughlin's Estate,* 4 Wash. 570, 30 Pac. 651, 16 L. R. A. 699; *In re Smith's Estate,* 4 Wash. 702, 30 Pac. 1059, 17 L. R. A. 573; *Kelley v. Kitsap County,* 5 Wash. 521, 32 Pac. 554; *In re Wilbur's Estate,* 14 Wash. 242, 44 Pac. 262. The facts here shown render it too plain to admit of argument to the contrary that appellant and Nick Meton did not comply with our marriage statutes in any particular looking to their marriage, other than to make two of the three affidavits required as a prerequisite to the procuring of a marriage license, and the payment of the marriage license fee.

Appellant relies upon our decisions in *McDonald v. White,* 46 Wash. 334, 89 Pac. 891; *In re Sloan's Estate,* 50 Wash. 86, 96 Pac. 684, 17 L. R. A. (N. S.)

960; *Thomas v. Thomas,* 53 Wash. 297, 101 Pac. 865, and *In re Brenchley's Estate,* 96 Wash. 223, 164 Pac. 913, L. R. A. 1917E 968.

In the *McDonald* case, there was an actual marriage ceremony performed by a duly ordained minister, and thereafter the parties lived together for many years, holding themselves out to the world as husband and wife. In the course of the opinion, it is said: "The evidence does not affirmatively show that such a license (meaning marriage license) was issued, nor does it affirmatively show that it was not issued." This seems to be the principal attack made upon the validity of the marriage. It was there held, in substance, that the presumption arising from cohabitation for a period of years, and the fact that there was a marriage ceremony, was sufficient proof of a lawful marriage. It is true that, in the case before us, the cohabitation for a number of years under the belief of lawful marriage would, standing alone, raise a strong presumption of marriage. But the trouble in this case is that the evidence goes too far and shows affirmatively that there never was a lawful marriage. The *Sloan* decision is relied upon because of its recognition of the rule, as therein quoted, that "The presumption of marriage from cohabitation, apparently matrimonial, is one of the strongest presumptions known to the law." This is no greater aid to appellant than the *McDonald* decision. The *Thomas* decision aids appellant to no greater extent. The *Brenchley* decision is well summarized in the syllabus, as follows:

"Where a woman entered into a marriage in good faith without knowledge that the marriage was void because the husband had been divorced within less than six months previously, and they lived together in

good faith as man and wife and accumulated property by their joint efforts, the probate court has jurisdiction, on the death of the husband, to award one-half of the property to her, as a just and equitable distribution of their joint accumulations."

Our decision in *Buckley v. Buckley,* 50 Wash. 213, 96 Pac. 1079, 126 Am. St. 900, rests upon the same view of the law as announced in the *Brenchley* decision, though that was a disposition of property in an annulment of marriage action, which property would have been community property had the marriage been legal. Each of these decisions, while recognizing the marriage as void, disposed of the woman's property rights on broad principles of equity and estoppel invoked against the man, in the one case, and against those claiming under him as heirs, in the other. This is not a case of disposition of property which appellant held in common with Nick Meton. The argument of counsel touching this branch of the case rests upon the good faith of appellant in her cohabitation with Nick Meton, in the belief that she was married to him, and the presumption arising therefrom. But, as already noticed, the evidence in this case proves too much, since it goes to the extent of conclusively showing that there never was any issuance of a license authorizing such marriage, or solemnization of such marriage, or the issuance of a certificate by any one purporting to evidence such marriage. That the presumption arising from such cohabitation in good faith is rebuttable was recognized in *Weatherall v. Weatherall,* 56 Wash. 344, 105 Pac. 822.

Some contention is made in appellant's behalf that she is, in any event, a dependent of Nick Meton, within the meaning of the workmen's compensation act. The

fallacy of this contention is shown by the definition of the word "dependent," found in the act itself, as follows:

"Dependent means any of the following named relatives of a workman whose death results from any injury and who leaves surviving no widow, widower, or child under the age of sixteen years, viz.: Invalid child over the age of sixteen years, daughter, between sixteen and eighteen years of age, father, mother, grandfather, grandmother, stepfather, stepmother, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-sister, half-brother, niece, nephew, who, at the time of the accident, are dependent, in whole or in part, for their support upon the earnings of the workman." Rem. Code, § 6604-3.

Plainly appellant's relation to Nick Meton does not bring her within any of the classes of persons so defined as "dependents." So her claimed right to compensation from the accident fund must be disposed of by the answer to the question, Was she the legal wife of Nick Meton at the time of his death? We see no escape from the conclusion that this unfortunate appellant cannot be awarded compensation from the accident fund as prayed for by her.

The judgment is affirmed.

MAIN, C. J., MOUNT, HOLCOMB, and FULLERTON, JJ., concur.

[No. 14949. Department One. January 6, 1919.]

ROGER E. WILLIAMS, *Appellant*, v. SCHOOL DISTRICT No. 189, *Respondent*.[1]

SCHOOLS AND SCHOOL DISTRICTS (49) — TEACHERS — CONTRACT — BREACH. After the direct action of a school board in discharging a principal of schools had been reversed by the county superintendent, the board cannot designate a subordinate teacher as "superintendent" of schools and require the principal to work under him; and it is immaterial that Rem. Code, § 4524, provides for the election of a superintendent or principal to have charge of the schools, the position and not the name being material.

SAME (40)—CLAIMS—BREACH OF TEACHER'S CONTRACT—NECESSITY OF APPEAL. Where an order discharging a principal of schools has been reversed on his appeal to the county superintendent, and the school board, by indirection, sought a reversal by offering a different employment compelling the principal to work under a "superintendent" who was formerly a teacher under him, the principal is under no obligation to take a second appeal whether the action of the board be considered another dismissal or an offer of new employment.

Appeal from a judgment of the superior court for King county, French, J., entered January 14, 1918, upon granting a nonsuit, dismissing an action on contract. Reversed.

Tom Alderson, for appellant.

Alfred H. Lundin and *S. M. Brackett*, for respondent.

MITCHELL, J.—Appellant seeks to recover for an alleged breach of contract. The trial court granted a motion for a nonsuit at the close of plaintiff's proof.

At the end of about five years of service as principal and teacher of schools in school district No. 173 of King county, the same being a school district of the second class, appellant, continuing his relations, entered into a written contract with the school district on March 10, 1915, by which he was further employed

[1]Reported in 177 Pac. 635.

for two years, commencing June 23, 1915, as principal and teacher of schools of the district, at $1,350 per year, payable monthly. The school district had two or more schoolhouses and employed six or seven other teachers, among them being one E. S. Hill, all of whom were under appellant as principal. After making the contract, school districts 173 and 166 were consolidated into school district No. 189, the respondent here, the consolidation becoming effective August 1, 1916. In the act of consolidation, the rights of appellant under his contract were preserved and recognized as binding on the respondent, which regularly paid appellant's salary according to the terms of the contract for the months of August and September, 1916.

By a written notice dated September 2, 1916, the school board notified appellant that, at a regular meeting held on September 1, 1916, the school board, for good and sufficient reasons, dismissed him as principal and teacher, to take effect September 2, 1916. Appellant appealed to the county superintendent of common schools, as provided by Rem. Code, § 4706, and the order of the board discharging him was by the superintendent reversed on September 25, 1916.

On September 28, 1916, the school board, by written notice, directed appellant to report for duty, according to his contract, on or before nine o'clock a. m., October 2, 1916, else his position would be declared vacant. Appellant complied with the notice and was met by two members of the school board and Hill, heretofore a teacher under appellant, and by them was informed that Hill had been elected by the board to a position designated as superintendent of the district schools and as such would have charge and supervision of affairs, and that appellant could proceed as a teacher under the directions of this new superintendent. Appellant declined to accept the new work and position

offered, which would reduce him to the rank of a teacher only and subordinate him to Hill, who until now had been under appellant.

The school year having already commenced, appellant was unable to get a position, and after the close of the school year as well as the end of the term mentioned in his contract, he has sued for damages to the extent of the balance of the last year's salary due him.

The granting of the nonsuit was error. After the direct action of the board in September discharging appellant as principal had been reversed by the county superintendent, it is evident the school board then attempted by indirection to set aside that reversal by means of an offer to appellant of a new and different employment which varied the terms of the first engagement. Indeed, the new offer by which appellant, who for years had been principal of the schools, should now be subordinated to the place of a teacher beneath one heretofore a teacher, now made principal, though designated superintendent, under the pretense that such course on the part of respondent was a fulfillment of its contract with appellant to act as principal, suggests not only a disposition, but an intention, to offend and degrade. Appellant was within his rights in declining the new offer. *Waldrip v. Hill,* 70 Wash. 187, 126 Pac. 409; *Jackson v. Independent School District of Steamboat Rock* (Iowa), 77 N. W. 860; *Birdsong v. Ellis,* 62 Miss. 418.

Respondent contends there is merit in its claim that Hill was chosen as superintendent of the district schools, while appellant, by the contract, was designated principal, because Rem. Code, § 4524, provides:

"In all districts of the second class the board of directors shall elect a *superintendent,* or *principal,*

who shall hold a valid teacher's certificate. The said superintendent, or principal, shall have supervision of the several departments of school, etc."

This contention is but a quibble. Obviously, it is intended that only one person shall exercise supervision, and the name to be given that position, whether superintendent or principal, is immaterial. The position itself is the thing involved, and to which appellant was entitled under his contract.

Again, it is contended by respondent that, if appellant was aggrieved at the new offer of the board, he should have appealed therefrom to the county superintendent of schools. This contention is untenable, for, bearing in mind the board had just been reversed for discharging appellant, if the new offer by the board to appellant is to be considered as another dismissal of him by indirection, no new service or cause intervening, the law does not exact of appellant the idle process of another appeal; while, if the action of the board in October should be treated as an offer of new and different employment in satisfaction of an outstanding contract, we are not advised of any law or reason requiring appellant, by appeal or otherwise, to let another say if he shall make a contract.

Judgment reversed.

MAIN, C. J., MACKINTOSH, TOLMAN, and CHADWICK, JJ., concur.

[No. 14956. Department One. January 6, 1919.]

AMERICAN SAVINGS BANK & TRUST COMPANY, *Appellant*, v. NATIONAL SURETY COMPANY *et al., Respondents.*[1]

COUNTIES (46)—CONTRACTS — CONTRACTOR'S BONDS—"STATUTES"—MONEY LOANED. A person loaning money to a contractor on county highway work, is not entitled to file a claim against the contractor's bond conditioned in the exact language of Rem. & Bal. Code, § 1159, to pay all laborers, mechanics, subcontractors, or materialmen and all persons supplying the contractor with provisions or supplies, "all just debts, dues and demands" incurred in the performance of the work; since the quoted words refer to the classes of persons named, and do not include creditors or persons loaning money.

STATUTES (68)—LEGISLATIVE CONSTRUCTION. The fact that the legislature in amending the act relating to contractor's bonds (Rem. Code, § 1159), added a proviso that the act shall not apply to money loaned or advanced, does not show that it construed the former law (Rem. & Bal. Code, § 1159) to include such items.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 11, 1918, upon findings in favor of the defendant, dismissing an action on a contractor's bond, tried to the court. Affirmed.

Farrell, Kane & Stratton, for appellant.

C. B. White, for respondents.

TOLMAN, J.—This action was instituted by appellant for the purpose of recovering money loaned to the defendant Lane for use in prosecuting his work under a highway contract, and respondent is sought to be held by reason of its being surety upon the bond given in accordance with the terms of that contract. From a judgment denying a recovery against the bond, this appeal is taken.

[1]Reported in 177 Pac. 646.

The facts pleaded and proved, so far as necessary to be here set forth, are substantially as follows: In April, 1914, the board of county commissioners of King county let a contract to Lane for the construction and improvement of what is known as the C. L. Morris Road. This was the usual lump sum contract, providing for the payment in monthly estimates as the work progressed, of seventy-five per cent of the contract price, and the retention of twenty-five per cent to be paid thirty days after the completion of the work, upon a showing by the contractor "that all just debts due all laborers, mechanics, materialmen and persons who have supplied such contractor, or sub-contractor, with material or goods of any kind for this work have been paid." The contract further required the furnishing of a corporate surety bond "conditioned as required by law for the payment of all laborers, mechanics, subcontractors and materialmen, and all persons who shall supply such person or persons or subcontractors with provisions or supplies for the carrying on of such work, all just debts, dues and demands incurred in the performance of such work." In due course the bond was furnished, upon which the respondent was bound as surety, conditioned in the exact words of the contract which have just been quoted.

It is not necessary to set out here the various transactions which took place between the appellant and the contractor, but for present purposes it is sufficient to say that the appellant loaned the contractor a large sum of money, and he assigned the proceeds of the contract to the appellant as security for such loan. Appellant received the several payments made by King county during the progress of the work, and, by stipulation, afterwards, and after crediting all of such payments, filed its lien claim, and now seeks judgment against the bond for upwards of $16,000.

It will be observed that the language of the contract and the conditions of the bond are the exact language of the act of 1909 (Laws of 1909, p. 716; Rem. & Bal. Code, § 1159). And the appellant argues that the language of this act should be construed as though the last clause thereof was preceded by the words "and will pay," so that the clause would read, "and will pay all just debts, dues and demands incurred in the performance of such work," contending that we have so construed the law in effect by our holding in *Title Guaranty & Surety Co. v. Coffman, Dobson & Co.*, 97 Wash. 211, 166 Pac. 620. A reading of that case without an examination of the record and without reference to the cases on which it is based might lead to that conclusion, but when the record is examined it will be found that the bond there sued upon, in lieu of the last clause of the statutory condition, contained the words "and shall well and truly and faithfully pay all just debts, dues and demands incurred in the performance of said contract," making it clear that the surety had thus contracted to pay all such debts, dues and demands without reference to the requirements of the statute; and since money loaned is a just debt, the court was bound to permit a recovery wholly as a matter of contract and without reference to the language of the statute upon which the present case turns.

It becomes necessary then to inquire the meaning of the statutory language which is incorporated in the bond in this case and in the contract in pursuance of which the bond was given. In *Puget Sound State Bank v. Gallucci*, 82 Wash. 445, 144 Pac. 698, Ann. Cas. 1916A 767, which like *Title Guaranty & Surety Co. v. First Nat. Bank of Hoquiam*, 94 Wash. 55, 162 Pac. 23, turned upon the language of the contracts and bonds, just as did the *Coffman-Dobson* case, and in

none of which the language of the statute was controlling, Mr. Justice Parker, speaking for the court, said:

"If the solution of this problem rested alone upon the language of the bond and statute, there would be fair ground upon which to rest the argument that the words 'all just debts, dues and demands incurred in the performance of the work,' not being preceded by the conjunctive 'and,' related to debts, dues and demands incurred and payable from Gallucci to the persons specifically named therein, to wit, 'laborers,' 'mechanics,' 'subcontractors,' 'materialmen,' and persons furnishing 'supplies for carrying on of said work.' "

And again:

"We cannot escape the conclusion that this provision of the contracts includes debts incurred by Gallucci of the nature here involved; that is, that he incurred such debts to the bank 'in the performance of said work,' though this conclusion might not be correct where the bank's right rested alone upon the language of the bonds and statute."

We are convinced, by a careful reading of the act of 1909 as a whole, that the legislature intended it to mean just what Judge Parker said there were fair grounds for holding it to mean, i. e., that the words "all just debts, dues and demands" refer to the classes of persons immediately thereinbefore named, so that the only logical construction is that quoted from the *Gallucci* case. If the legislature intended otherwise, why did it, throughout the entire act, refer to the persons mentioned in § 1, namely, laborers, mechanics, subcontractors, materialmen, and those who furnished supplies, and nowhere mention creditors, or use any term which would cover those holding claims other than for labor, materials or supplies? The form of the notice provided in § 3 of the act should not, of course, be permitted to override or modify any ex-

press provisions which precede it, and yet this form is eloquent in expressing that the legislature had only in mind the classes specifically mentioned in § 1 of the act.

It should be borne in mind that the legislature had in view here public works and buildings and was providing security and protection only to those who, if the work were private in its nature, would be protected by the lien laws. In other words, the bond given under this statute and in the statutory language becomes a substitute for the right of lien which would exist were the work private. And, therefore, looking to analogous lien cases for a rule as to who may claim under the bond, we find the prevailing doctrine to be that one who loans money is entitled to no lien therefor. *Lawson v. Higgins,* 1 Mich. 225; *Steamboat James Battle v. Waring,* 39 Ala. 180; *Dart v. Mayhew & Co.,* 60 Ga. 104; *Cadenasso v. Antonelle,* 127 Cal. 382, 59 Pac. 765; *Lion Bonding & Surety Co. v. First State Bank* (Tex. Civ. App.), 194 S. W. 1012.

Hence it logically follows that one who loans money to a contractor on public work cannot claim under the statutory bond.

Nor are we impressed by the argument that the legislature in 1915 (Laws of 1915, p. 61; Rem. Code, § 1159), when it amended the act of 1909 (Laws of 1909, p. 716; Rem. & Bal. Code, § 1159), by leaving out all reference to debts, dues and demands, and by adding a proviso to the effect that the provisions of the act shall not apply to any money loaned or advanced, thereby construed the former act as appellant would have it. It seems to us more logical to say that the legislature of 1915 for some reason feared that this court or some other court might so construe the act against its intent, and by amendment it made haste to

remove all possibility of such a construction beyond any question or doubt.

Our conclusions upon this branch of the case make it impossible for the appellant to recover in any event, and it is therefore unnecessary to discuss the other questions raised.

The judgment of the court below is right, and is therefore affirmed.

MAIN, C. J., MITCHELL, MOUNT, and CHADWICK, JJ., concur.

[No. 14970. Department One. January 6, 1919.]

EDWARD J. KIRKLAND *et al.*, *Appellants*, v. E. O. DRESSEL *et al.*, *Respondents*.[1]

FRAUD (4)—EXPRESSION OF OPINION. Representations and assurances by a trustee for creditors, and purchasers from it, given to the debtor's parents to whom he was indebted for services and money loaned, whereby the parents were induced not to file claims with the trustee, do not constitute actionable fraud, where, at most, they amounted only to expressions of opinion that the business would pay all creditors and leave sufficient to the son to pay them, especially where it seems they were largely actuated by a desire to aid their son by withholding their claims.

FRAUDS, STATUTE OF (1)—CONTRACT TO ANSWER FOR DEBT OF ANOTHER. Oral promises by a trustee for creditors that claims would be paid in full fall within the inhibition of the statute of frauds.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered June 19, 1917, upon granting a nonsuit, in an action for fraud, after a trial to the court and a jury. Affirmed.

Roche & Onstine, for appellants.

Wakefield & Witherspoon (*Harry T. Davenport*, of counsel), for respondents.

[1]Reported in 177 Pac. 643.

TOLMAN, J.—Appellants brought this action, alleging that, by fraud and deceit of respondents, they were deprived of, or prevented from realizing upon, four different and separate choses in action. The case was tried to a jury, and at the close of appellants' evidence, the trial court sustained a motion for a nonsuit, took the case from the jury, and entered a judgment in favor of respondents as a matter of law, from which judgment this appeal is taken.

Having in mind the rule laid down in *Godefroy v. Hupp,* 93 Wash. 371, 160 Pac. 1056, the evidence, or the reasonable inferences from the evidence offered by appellants, discloses substantially the following facts: Edward R. Kirkland, one of the defendants, and a son of appellants, who are husband and wife, was, on February 6, 1911, and for a long time prior thereto, engaged in the general merchandise business at Metaline and at Metaline Falls, in Pend Oreille county, Washington, and then had assets of the book value of about $25,000, but was heavily involved, owing some $19,000, which apparently he was unable to pay as it matured. On the date last mentioned, he transferred all of his assets by trust deed to the Spokane Merchants' Association, conditioned that the association should take immediate possession, operate the business, or dispose of the same, together with the other assets, at public or private sale, collect or compromise all outstanding accounts, and, after paying the expenses, to distribute the proceeds equally and ratably to the creditors, and after the payment of all the indebtedness in full, reconvey what might remain of the assets to Edward R. Kirkland. At the time this deed of trust was made, Edward R. Kirkland was indebted to appellants in the sum of $500 or $550, being cash loaned to him by his mother, which was evidenced

by a note for $500, dated ten days before the making of the trust deed, secured by a bill of sale of the same date, purporting to transfer to the payee of the note three head of horses therein described, which bill of sale appears not to have been recorded. Also, at the time of the making of the trust deed, Edward R. Kirkland was indebted to appellants in the sum of $2,100 for fourteen months wages earned by his father, who had been in his employ during that length of time under an agreement that he should receive $150 per month for his services, no part of which, it is claimed, was ever paid. The note indebtedness was shown on the books, but the indebtedness for services was not so shown.

Respondent Leggett was an adjuster employed by the Merchants' Association, and went to Metaline Falls for the purpose of taking an inventory of the business so transferred, and to arrange for the management and operation of the same, and at various times later visited the place where the business was carried on, for the purpose of overseeing and checking up the books and reporting conditions to the association. . Respondent E. O. Dressel was employed by the association as manager of the mercantile business so turned over to it, and had personal charge and direction of the same under Leggett. Shortly after the making of the trust deed, appellants informed Leggett and Dressel of their claims against their son, Edward R. Kirkland, and, according to appellants' testimony, Leggett and Dressel then advised that the claims be not presented or then insisted upon, as they were large and if so presented would probably result in the creditors filing a petition in bankruptcy, and apparently respondents Leggett and Dressel said or intimated that, without such presentation, the claims could be paid

out of the business after all other creditors were paid in full, and at or before the time when the remaining assets should be returned to Edward R. Kirkland. Whether relying upon these representations or for other reasons, appellants did not lay claim to the horses described in the bill of sale given to secure the note, but permitted the same to be taken possession of and inventoried by the Merchants' Association. Nor did appellants present either of these claims to the association, or ever make directly to it any claim that they were creditors of Edward R. Kirkland.

By agreement with respondents Leggett and Dressel, appellant Edward J. Kirkland accepted employment by the Merchants' Association at an agreed salary of $90 per month, of which he claims to have drawn not to exceed $40 per month, and this mostly in merchandise from the store. Appellant Edward J. Kirkland so continued in such employ during the three years that the association was in charge of the business, and seems to have rendered faithful services. The third claim or chose in action mentioned in the complaint being the balance claimed to be due for the services so rendered.

It further appears that, in June, 1913, Edward R. Kirkland procured from his mother a loan of $575 (whether she thought she was loaning the money to her son or to the association is somewhat obscure), which money apparently he turned over to respondent Dressel in charge of the business for the Merchants' Association, but for just what purpose does not clearly appear, although there is some testimony to the effect that it was needed to make up a sufficient sum to pay an expected or promised dividend to creditors. At the time of obtaining this $575, Edward R. Kirkland

gave to his mother as security therefor a memorandum in writing, as follows:

"Metaline, Wash., June 14/13.

"This is to certify that I, E. R. Kirkland, have this day sold to Mrs. Sarah J. Kirkland, one black team of horses and wagon and one yoke cattle about 5 years old for the sum of five hundred seventy-five dollars ($575). E. R. Kirkland."

Apparently the property mentioned in this memorandum was then in the possession of the Merchants' Association, claimed by it under its trust deed, all of which was well known to appellants; and the reasonable inference is that it was intended to take effect and transfer title to Sarah J. Kirkland when all of the other creditors should have been paid in full and the remainder of the property returned to Edward R. Kirkland. This item constitutes the fourth demand or chose in action set forth in appellants' complaint.

During the three years in which the Merchants' Association was in charge of the business, the indebtedness was reduced from $19,000 to about $7,500, and about February 1, 1914, respondent E. O. Dressel and Edward R. Kirkland went to Spokane, and through the Merchants' Association, and with the assistance of respondent Leggett, induced the remaining creditors of Edward R. Kirkland to accept seventy-five cents on the dollar in settlement of their claims, and to consent to a transfer by the Merchants' Association of all of the assets constituting the trust to respondent E. O. Dressel, in consideration of a cash payment of $5,400, which apparently was sufficient to pay the creditors the amount agreed upon. This purchase price of $5,400 was furnished, one-fourth by respondent E. O. Dressel, one-fourth by respondent Arthur W. Dressel, and one-half by respondent Leggett. No inventory was taken at the time of this sale, and

the conveyance was made direct and without condition to respondent E. O. Dressel. Appellants were informed as to what had taken place, and were given to understand that the transfer would in nowise prevent the payment of their claims, as theretofore understood, out of the business, which would still be carried on in trust in the same manner as before, with the privilege extended to Edward R. Kirkland, at any time within two years, to redeem or repurchase the business by paying $7,500, or an amount equal to the face of the claims of creditors, which in the transaction had been settled at seventy-five cents on the dollar. It is suggested that there was an agreement in writing to that effect, but none was produced or offered in evidence.

After this sale, matters appear to have gone on as before for a period of some six months, when respondent Edward R. Kirkland, having had some domestic difficulties, informed appellants that he was going away and would not make any attempt to redeem the business, and he did go away, and has never returned to the business or made any effort to redeem or purchase it. There is evidence that appellants, or one of them, had conversations at different times following the departure of Edward R. Kirkland, with the respondents, in which they inquired whether the fact that their son had gone away would have any effect on the payment of their claims, and received more or less general assurances that that would make no difference in the situation; and appellants claim that not until September, 1915, were they advised by respondents that they must look to their son for payment of their claims, and not to the business.

It is somewhat difficult to determine upon just what theory appellants hope to recover. The original rep-

resentations as to the probability of bankruptcy proceedings if appellants' claims were insisted upon, and the suggestions or statements that there would be enough left to pay them after all other creditors were paid in full, were clearly expressions of opinion only, and that, too, upon subjects of which appellants had equal knowledge, and upon which their own judgment should have been as good as that of respondents. Clearly these statements or representations do not constitute actionable fraud.

The claim for services rendered to the Merchants' Association had accrued at the time of the sale of the assets to the respondents, and appellants knew of such sale at the time it occurred. They were then privileged to present their claim to the association and demand their money, or to withhold it in the hope that thereby they might aid their son to redeem the business. The representations of respondents as to this matter do not appear to have gone beyond the statement that the son still had the same right as before to redeem the business, and there is no showing that such statements were false in any particular. This is also true of the $575 loaned in 1913. Assuming that the loan was, in fact, made to the association, and it was liable for both of these items, if it paid them, the amount so paid would be added to the sum which Edward R. Kirkland would have to pay before becoming repossessed of the business. The most reasonable inference to be drawn from the evidence, however, is that the $575 was loaned by appellants to their son with the expectation that he would repay them after he should have paid off his other creditors and redeemed the business.

There is a good deal of testimony to the effect that respondents, or some of them, gave repeated assur-

ances that all of appellants' claims would be paid out of the business, both before and after the transfer from the Merchants' Association to respondent Dressel, and some evidence that these assurances were repeated after Edward R. Kirkland abandoned the business. However, at the most, these were expressions of opinion only that Kirkland would redeem, or that the business would itself pay out, and they fall far short of being actionable.

Nor can respondents be held upon the theory that they assumed and agreed to pay the debt of another, whether that other be Edward R. Kirkland or the Spokane Merchants' Association, because all of their promises to pay, if there be any such, were oral only and fall within the inhibition of the statute of frauds. Much as we sympathize with appellants in their losses, yet we think the evidence and the reasonable inferences to be drawn therefrom all point to the fact that these losses were occasioned by the desire to assist their son, and their belief that he had the ability and steadfast purpose necessary to enable him to pay off in full his other creditors, redeem his business, and reimburse them. His failure to possess and exercise these qualities, rather than any representations made by respondents, is responsible for the result.

We find no error in the rejection of testimony complained of, nor in the ruling on the motion for nonsuit.

Judgment affirmed.

MAIN, C. J., CHADWICK, MACKINTOSH, and MITCHELL, JJ., concur.

[No. 14973. Department One. January 6, 1919.]

GEORGE F. BLACKBURN *et al.*, *Appellants*, v. KLAAS VANDER AARDE *et al.*, *Respondents*.[1]

REFORMATION OF INSTRUMENTS (15) — EQUITY (41) — LACHES. Where, by mistake, a deed omitted a clause requiring the grantees to assume a mortgage, and the mistake was not discovered until foreclosure of the mortgage, a cause of action for reformation of the deed did not accrue until entry of judgment of deficiency and notice thereof; hence the judgment debtors were not guilty of laches preventing suit for reformation of the deed, where the delay caused no loss to the grantees.

Appeal from a judgment of the superior court for Yakima county, Holden, J., entered October 27, 1917, dismissing an action for equitable relief, tried to the court. Reversed.

Roberts & Udell, for appellants.

E. B. Velikanje, for respondents.

TOLMAN, J.—In October, 1909, appellants were the owners of certain property in the city of Yakima, and, through a real estate broker, agreed with respondents to exchange their city property for ranch property then owned by respondents. The ranch property was valued at $7,000, the city property at $6,000, and to make up the difference in value, appellants turned in a certain real estate contract on other city property at an agreed value, and paid in cash the balance of something over $400. The city property was subject to two mortgages, a first mortgage of $1,600, and a second mortgage of $1,900, while the ranch property was clear. Respondents agreed to assume and pay these mortgages upon the consideration that appellants would give to them their notes for $3,500, to mature before the mortgages on the city property, and

[1]Reported in 177 Pac. 658.

secured by mortgage on the ranch property which they were then receiving. This was done and the transfers were made, but by error and mutual mistake, which is practically admitted, the deed from appellants conveying to respondents the city property failed to state that respondents assumed and agreed to pay the mortgages thereon, but simply recited that the property was subject to the two mortgages described. Thereafter, and substantially in accordance with the terms thereof, appellants paid to respondents the $3,500 and interest in discharge of the notes and mortgage which they had given on the ranch property. Respondents paid the second mortgage on the city property, which was first to mature, but having thereafter conveyed the property to others, neglected to pay the first mortgage when it matured, or at all. In due time, an action to foreclose the first mortgage was commenced, and appellants, while answering thereto, appear to have relied upon the fact that respondents had paid the second mortgage only after a foreclosure had been commenced, and to have assumed that they would so pay the first mortgage before judgment. In any event, appellants did not examine the record and ascertain the omission from the deed of the covenant to assume and pay the mortgages, until after a deficiency judgment for $500 had been rendered against them in the foreclosure proceeding on June 29, 1916, and a demand for payment had been made upon them in August following; and having paid the deficiency judgment, they then brought this action to reform the deed and recover from respondents the amount so paid. The facts were practically admitted upon the trial below. The sole defense relied upon was laches. This defense was sustained by the trial court and a judgment of dismissal entered, from which this appeal was taken.

While considerable time elapsed between the mak-

ing of the deed and the commencement of this action, that is largely immaterial, because there was no breach of the covenant to pay the mortgage until it was permitted to become overdue and go to foreclosure, and nothing to put appellants on notice that there might be such a breach. The cause of action for the money recovery did not accrue before the entry of the deficiency judgment against appellants; and, until they had notice of such judgment, nothing appears in the record of sufficient importance to require them to examine the public record and discover the error in the deed which is complained of. It is not urged or seriously claimed that the delay on the part of appellants in discovering the error in the deed and in bringing an action for its reformation caused any loss to respondents, or led them to alter their position in any way to their detriment. The mere fact of delay alone is relied upon to sustain the judgment.

In *Young v. Jones,* 72 Wash. 277, 130 Pac. 90, where a like question was involved, Judge Ellis, speaking for this court, said:

"The doctrine of laches as a defense is grounded on the principle of equitable estoppel, which will not permit the late assertion of a right where other persons by reason of the delay will be injured by its assertion. The case before us presents no such aspect. No right of a third party is involved. The respondents Lofgren had notice of the appellants' claim almost as soon as the mistake was discovered. There is no evidence that the respondents or any one else will be placed in any worse position by a reformation because of the delay. No adverse equities have arisen in the interim. The fact of appellants' claim was at all times known to those claiming adversely. There was no evidence of fraud, deceit, or bad faith on the appellants' part. In such a case, mere delay, short of the period fixed by the statute of limitations, will not bar the action."

This doctrine was expressly reaffirmed in *Carlson v. Druse*, 79 Wash. 542, 140 Pac. 570, and may now be accepted as the settled law of this state; and it may be safely asserted that it is in harmony with the great weight of authority. Measured by this rule, appellants were not guilty of such laches as would bar their right to recover.

The judgment is reversed, with instructions to enter a judgment for the reformation of the deed as prayed for, and for the sum paid by appellants in satisfaction of the deficiency judgment, with interest at the legal rate from the time of such payment.

MAIN, C. J., MACKINTOSH, MITCHELL, and CHADWICK, JJ., concur.

[No. 14984. Department Two. January 6, 1919.]

THE STATE OF WASHINGTON, *Respondent*, v. LORIN D. ANGEVINE, *Appellant*.[1]

CONTEMPT (3) — PUBLICATIONS RELATING TO COURT PROCEEDINGS. Rem. Code, § 2372, subd. 7, providing that one who publishes a false or grossly inaccurate report of court proceedings shall be guilty of a misdemeanor, designates a particular kind of criminal contempt, regardless of common law definitions; and an information plainly charging the same is not subject to demurrer.

SAME (3)—PUBLICATIONS—PENDENCY OF PROCEEDINGS. In a prosecution for criminal contempt by publishing a false report of testimony that had already been given, the case was "pending" when the trial continued for several days after the publication.

SAME (22)—EVIDENCE—SUFFICIENCY. In a prosecution for criminal contempt by publishing a false report of court proceedings, the admission of the publication, and evidence of its gross inaccuracy and the synchronous pendency of the action, sustained a verdict, the weight and credibility of the evidence being for the jury.

SAME (3)—PUBLICATIONS RELATING TO COURT—PENDENCY OF PROCEEDINGS. The publication of a false or grossly inaccurate report

[1]Reported in 177 Pac. 701.

of the proceedings of a court is criminal contempt, within Rem. Code, § 2372, subd. 7, whether the proceedings are pending at the time of the publication or concluded prior thereto.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered February 14, 1918, upon a trial and conviction of contempt. Affirmed.

H. V. Davis, for appellant.

John B. White, for respondent.

Holcomb, J. — Appellant, editor of The Spokane Press, was by information charged with, and by a jury found guilty of, the crime of criminal contempt, under Rem. Code, § 2372, which is as follows:

"Every person who shall commit a contempt of court of any one of the following kinds shall be guilty of a misdemeanor: . . .

"(7) Publication of a false or grossly inaccurate report of its proceedings."

Omitting the formal parts, the information is as follows:

"That on or about the twenty-second day of September, 1917, in the county of Spokane, state of Washington, the defendant, Lorin D. Angevine then and there being, and being then and there the editor in charge of a daily newspaper publication known and styled 'The Spokane Press,' which said newspaper circulated generally to the public in the city of Spokane, Washington, did then and there wilfully and unlawfully publish in said newspaper a false and grossly inaccurate article and alleged report of the proceedings in the case of the state of Washington, plaintiff, against James Ballmaine, defendant, which said case was a criminal prosecution and had theretofore immediately preceding said publication been, and was then, pending and being tried in the superior court of the state of Washington in and for Spokane county before

the Honorable Bruce Blake, a judge presiding, and a jury, which said false and grossly inaccurate article and alleged report so published was in the words and substance as follows, to wit:

"'Rotten!

"'Alone in a man-filled court room, Gladys Moore was put thru a disgusting rigmarole, by tittering and smirking attorneys in Judge Blake's court, Friday afternoon.

"'The girl had charged James Ballmaine with having assaulted her. Prosecutor Jack White and attorney Bill Donovan took turns at questioning her—questions of the most personal nature.

"'It was 'rich stuff' for the onlookers, among whom were boys of tender years.

"'Donovan and White took it lightly, for they smiled and winked at friends in the crowd.

"'The Press knows nothing about Gladys Moore; BUT THE PRESS KNOWS THAT SUCH A THING AS THIS SHOULDN'T BE AIRED IN OPEN COURT. Common decency should have prompted Judge Blake to call the case in chambers and to have reprimanded the attorneys for their failure to realize that the thing was deadly serious.

"'Also, boys should be kept out at such times;'

"and which said published report was false and grossly inaccurate in the respects following, to wit:

"It was not true that 'Gladys Moore was alone in a man-filled court room,' because, in truth and in fact, reputable women interested in the welfare of the said Gladys Moore attended with her during the said trial and were present in the court room and in close communication with the said Gladys Moore, and

"It was not true that 'Gladys Moore was put thru a disgusting rigmarole by tittering and smirking attorneys', because, in truth and in fact the proceedings in the said cause and trial were conducted in conformity with the rules of law and propriety under the control, supervision and directions of the court there presiding, and

"It was not true that 'Prosecutor Jack White (meaning John B. White, prosecuting attorney) and Attorney Bill Donovan took turns at questioning her,'

because, in truth and in fact, John B. White, prosecuting attorney, referred to in said publication as 'Prosecutor Jack White,' took no part in the trial of said cause and did not, during the whole progress of said trial, ask or propound any question of or to any witness testifying therein, and

"It was not true that 'Boys of tender years' were among the parties attending at said trial, and

"It was not true that 'Donovan and White took it lightly,' or that they (meaning W. C. Donovan, the attorney appearing for the defendant at said trial, and John B. White, prosecuting attorney) smiled and winked at friends in the crowd,' and

"It was not, and is not true 'that such a thing [meaning the trial of the issue in said cause] as this shouldn't be aired in open court; because, under the constitutions and laws of the United States and of the state of Washington, the accused defendant in all criminal prosecutions is entitled to and guaranteed, among other things, 'a public trial,' and

"It was not and is not true that the presiding judge in such cause and trial should have called the said cause for trial in chambers (meaning in the privacy of the judge's personal quarters), because such proceeding would have been violative of the constitutional rights of the defendant, and

"Said false and grossly inaccurate article and alleged report so published was then and there published with the intent to prejudice, influence and embarrass the court, the jury and the counsel in the aforesaid case then pending; and did then and there prejudice, embarrass and influence the court, the jury, and the counsel in the aforesaid case then pending, and then and there did tend to prevent a fair and impartial trial of the aforesaid case then pending."

The overruling of the demurrer to the foregoing information is assigned as error. We think that subd. 7 of § 2372, *supra*, designates a particular kind of contempt which, if committed by a person, renders him guilty of a misdemeanor. This constitutes a criminal

misdemeanor, regardless of former definitions of common law contempt by this and other courts, relied upon by appellant, requiring some element of attempting to influence the court, obstruction of justice, or interference with the orderly procedure of the court contemned. The information sufficiently charges the defendant with publishing a false or grossly inaccurate report of the proceedings of a case then pending before the court. The publication of a false or grossly inaccurate report of the court's proceeding is made one of the offenses of criminal contempt by legislative action. We have no doubt that the language used by appellant in the publication as charged constitutes contempt under the above section of the code.

The appellant contends that the case of State v. Ballmaine could not be considered as then pending, for the complaining witness had testified prior to the offending publication; but the fact is that the trial proceeded several days after the publication.

The appellant contends that the court erred in denying the challenge to the sufficiency of the evidence, motion for a directed verdict, and motions in arrest of judgment and for a new trial. As there was competent evidence tending to impose guilt upon appellant, its weight and credibility were for the jury to pass upon. The admission of the publication by appellant, and evidence of its gross inaccuracy and the synchronous pendency of the action, were sufficient to sustain the verdict of the jury.

It is further contended that the refusal of requested instructions was erroneous. There is no merit in this contention. The judgment of the trial court is affirmed.

Mount, J., concurs.

PARKER, J. (concurring)—I concur with Judge Holcomb in his conclusion that the judgment of the trial court in this case must be affirmed. I fear, however, that his observations may be construed as evidencing a narrower view by the court of our criminal contempt statute than I am willing to assent to. As I view the statute, the language, "Publication of a false or grossly inaccurate report of its proceedings," when read in connection with the introductory paragraph of Rem. Code, § 2372, quoted at the beginning of Judge Holcomb's opinion is but the defining of a misdemeanor, the mere statutory name of which is "contempt of court." These defining words are not qualified by any words indicating that the publication must have reference to a pending proceeding in order to constitute the defined misdemeanor. As I view the statute, the defined misdemeanor is committed when there is a "publication of a false or grossly inaccurate report" of any court proceedings, whether pending at the time of such publication or concluded prior to such publication. I therefore think that Judge Holcomb's observations touching the pendency of the proceeding to which this publication related are unnecessary, and they suggest too narrow a view of the statute. If appellant had been charged with contempt and tried without a jury under Rem. Code, § 1049, apart from this criminal contempt misdemeanor statute, the pendency of the proceeding to which the publication related would have been a proper matter of inquiry.

MAIN, C. J., and FULLERTON, J., concur with PARKER, J.

[No. 14988. Department One. January 6, 1919.]

P. P. HAINES, *Respondent*, v. COASTWISE STEAMSHIP & BARGE COMPANY, *Appellant*.[1]

MASTER AND SERVANT (98, 99)—ASSUMPTION OF RISKS — OBVIOUS DANGERS—SIMPLE APPLIANCES. A seaman on a vessel, directed to use steps of simple construction such as are used on all American vessels, with which he was familiar, assumes the risks from the fact that they were out of position and unfastened, where that condition was open and obvious even to the most heedless.

TRIAL (64) — DIRECTION OF VERDICT — OBJECTIONS — SUFFICIENCY. Where one of plaintiff's causes of action failed, the supreme court cannot say that the trial court erred in denying general motions for a directed verdict and for verdict *non obstante*, directed to the entire case and both causes of action.

MASTER AND SERVANT (35, 167)—INJURY TO SERVANT—NEGLIGENCE —CUSTOMARY APPLIANCES—INSTRUCTIONS. In an action for personal injuries sustained by a cook on a vessel in using simple steps in common use, the defendant is entitled to instructions as to the simplicity of the device, and that an employer using apparatus which is in common and ordinary use in the same line of business is not liable for an accident which might have been prevented by the use of different apparatus.

SAME (159)—INJURIES TO SERVANT—CAUSE OF INJURY—QUESTION FOR JURY. In an action by an injured seaman, his testimony that he requested to be put ashore at the nearest port, and evidence that his injury was aggravated by a continuance of the voyage, makes a question for the jury upon such issue, even though the evidence was meager and contradicted.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 30, 1918, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee on a vessel. Reversed.

Trefethen & Findley, for appellant.

Silvain & Butler, for respondent.

[1]Reported in 177 Pac. 648.

TOLMAN, J.—This is an action for personal injuries, based upon two causes of action, the first, that the injuries complained of were caused by the negligence of the appellant; and second, that, after the injuries were received by the respondent, the appellant wilfully and negligently refused to put its vessel into the nearest port, or any port short of the end of the voyage, for the purpose of procuring medical and surgical attention for the respondent, whereby the effects of the injury were augmented and increased. Trial was had to a jury, which returned a verdict in respondent's favor, upon which judgment was entered, and from which this appeal is prosecuted.

The facts necessary to be considered are substantially as follows: The respondent was employed on July 28, 1917, to serve as cook aboard the barge "General Fairchild," then lying at Valdez, Alaska. He acted in that capacity for some nineteen days, when he was directed to perform the duties of wheelman, or helmsman. On August 16 following, the barge left Valdez, south-bound, in tow of a tug, and about August 30, when a day and a half out from Ketchikan, the accident which gave rise to this action occurred. At that time the respondent was standing with the captain of the barge near the starboard or right-hand rail of the barge, on the main deck, and a question arose as to the amount of water remaining in the barrels used for the storage of water on the poop deck. The poop deck was at the stern of the barge, raised above the main deck about three and one-half feet, and was reached from the main deck by two sets of steps or ladders, one on the starboard side and one on the port side of the barge. These steps or ladders were each placed in a leaning position against the poop deck so that the tops were flush therewith, and the bottoms

were secured in place, so as to prevent slipping, by cleats nailed to the main deck. Behind each set of steps was a cubby-hole used for storage, and, in order to open the door to either cubby-hole, it was necessary to put the steps in front of it to one side so that the bottom of the steps was no longer held in position by the cleats above referred to, all of which was open and obvious and as well known to the respondent as to any one on board the barge. Respondent, for at least nineteen days while he acted as cook, had frequently pushed aside the steps on the port side and opened the cubby-hole door for the purpose of obtaining fire wood from the cubby-hole, and had often observed other members of the crew doing the same thing. A few moments before the accident, the respondent had seen another member of the crew enter the cubby-hole on the port side by moving aside the steps in the usual manner, and it appears that this man had left open the cubby-hole door, which was about three and a half feet square, and had failed to replace the steps in their usual position and within the support of the cleats maintained for that purpose. The time was between four and five p. m. on a bright August day, and it is not claimed, or even intimated, that there was anything to prevent respondent from observing the position of the steps at a casual glance. Under these conditions, the captain directed the respondent to go upon the poop deck and ascertain the amount of water remaining in the barrels, and thereupon respondent crossed over to the port side of the barge and started to ascend the steps and, as he testifies: "When I got up three or four steps the bottom slipped out and my leg got caught in the steps and broke it."

On the second cause of action, respondent testified that, immediately after the accident, he requested to

be taken to the nearest port for medical attention, although he does not appear to have repeated this request nor in any way have denied the evidence introduced tending to show that he was brought on to Tacoma at his own request, or at least by his consent. There was also some evidence from which the jury might have found that the respondent's pain was increased and prolonged and his recovery somewhat delayed by his being brought to the end of the voyage with no attention except the rude surgery administered by the captain of the barge. But we find no evidence which would warrant the jury in concluding that any permanent ill effect followed therefrom.

Respondent relies upon *Norman v. Alaska Coast Co.*, 81 Wash. 64, 142 Pac. 434, *Campbell v. Winslow Lumber Co.*, 66 Wash. 507, 119 Pac. 832, *Shaughnessy v. Northland Steamship Co.*, 94 Wash. 325, 162 Pac. 546, Ann. Cas. 1918B 655, and like cases, to sustain the judgment. But after a painstaking examination of the testimony, we are unable to find any evidence as to the first cause of action sufficient to take it to the jury within the rule of these cases, or any rule recognized by this court, because, by respondent's own evidence, it appears that he knew as much about the steps and the manner of fixing them in position as any one, the fact that they were out of position and unfastened was open and obvious, and the open door of the cubby-hole was enough in itself to attract the attention of one, even the most heedless, who knew, as did respondent, by actual experience that the door could not be opened while the steps were in position. In addition, the steps were of simple construction, were such as were used on all vessels of American type, and, so far as the evidence shows, they were perfectly true to type, containing no defect, either hidden

or open. Taking that view of all of this evidence which is most favorable to the respondent, it must be apparent that reasonable minds could not honestly differ in the conclusion to be drawn therefrom, and that no negligence can thereby be imputed to the appellant; but, on the contrary, the respondent must be held to have assumed the risk.

The appellant interposed a motion for nonsuit at the close of the respondent's case, at the close of all of the testimony made a motion for a directed verdict, and after verdict made a motion for judgment *non obstante veredicto*. Had these motions, or any of them, been segregated as to the causes of action, so that we could find from the record that the appellant had requested the trial court to take from the consideration of the jury the first cause of action, we could readily take the position that such motion should have been granted and act accordingly. But as the motions were each general in their nature, referring to plaintiff's entire case on both causes of action, we cannot now say that the court erred in the denial of either of them.

Not so, however, with the instructions requested by appellant. It clearly appears that the steps in question were identical in every way with similar steps on every vessel of American type, and no vessel of any type is shown to have adopted or used better or safer methods of fastening such steps in place. Applicable to this situation, appellant requested the following instruction:

"An employer who uses apparatus which is in common and ordinary use in the line of business in which he is engaged, cannot be held liable for an accident which might have been prevented by the use of different apparatus."

This instruction substantially states the law as laid down by this court in *Griffith v. Washington Water Power Co.*, 102 Wash. 78, 172 Pac. 822, and the cases therein cited, and some such instruction should have been given.

Appellant also requested an instruction upon the simplicity of the appliance, which was in accordance with the well established rule of law applicable in this state, and this instruction should also have been given.

The only question in the entire case which, under the evidence, should have been submitted to the jury was whether the failure to stop at some intermediate port for medical attention was due to the neglect of the appellant or was at the request or with the consent of the respondent, and, if the former, was respondent's pain and suffering thereby increased or prolonged, and was his recovery thereby retarded? As hereinbefore indicated, the evidence of respondent touching these questions was decidedly meager, and the jury might well have found against him thereon; but since the respondent himself testified that he made the request to be put ashore at the nearest port, we cannot invade the province of the jury for the purpose of making a finding of fact upon these questions.

The judgment appealed from will be reversed, and the cause remanded with instructions to grant a new trial.

MAIN, C. J., CHADWICK, MITCHELL, and MACKINTOSH, JJ., concur.

[No. 14749. *En Banc.* November 20, 1918.]

CHARLES CARLSON, *Appellant*, v. WILLIAM S. MOCK *et al.*, *Respondents.*[1]

Appeal from a judgment of the superior court for King county, Smith, J., entered September 14, 1917, upon granting a nonsuit, dismissing an action for personal injuries sustained by a street railway employee struck by an automobile. Reversed.

Edwin H. Flick and *Fred D. Fletcher*, for appellant.
Roberts, Wilson & Skeel, for respondents.

ON REHEARING.

TOLMAN, J.—Upon rehearing *En Banc* and a careful reconsideration of the whole subject-matter, the majority of the court adheres to, and reaffirms the views heretofore expressed in, the opinion which will be found in 102 Wash. 557, 173 Pac. 637.

MAIN, C. J., PARKER, FULLERTON, and MITCHELL, JJ., concur.

HOLCOMB, J. (dissenting)—The majority having sustained the Department opinion herein, and there having been heretofore no opportunity for me to express my views upon the original opinion, I avail myself of the present opportunity so to do.

I disagree with the prevailing opinion, especially upon the restricted definition of the "plant" of a street railway system. The definition pronounced is too limited and its importance is far reaching.

Cable or electric street railways were expressly brought within the terms of the act as extra-hazardous occupations, and "all employees of street railways" were classified as in extra-hazardous occupation. The plant of such a system must necessarily constitute and include, not only the private premises of the system devoted to such use, but the poles and wires (*Brown v. Gerald*, 100 Me. 351, 61 Atl. 785, 109 Am. St. 526, 70 L. R. A. 472) and the fixtures, machinery, apparatus, appliances, etc., necessary to carry on the trade or business, or any mechanical operation or process. *Scott Supply & Tool Co. v. Roberts*, 42 Colo. 280, 93 Pac. 1123; Ency. Dictionary; Webster's International Dictionary; *Wood v. United States Fidelity & Guaranty Co.*, 143 Fed. 424; *McKeon v. Proctor & Gamble Mfg. Co.*, 76 Misc. Rep. 599, 135 N. Y. Supp. 891. Other similar constructions could be cited.

Under the prevailing opinion, a street railway would have no plant except its power plant or car barn, if it had any such. Some electric street railways have no power plant, but buy electric power from an independent concern. Some such systems, if new or small,

[1]Reported in 176 Pac. 2.

may even dispense with car barns and have nothing but their franchises and tracks upon public streets. Such systems would, therefore, have no plant, and although expressly denominated extra-hazardous occupations for its employees, the employer would be read out of the act. This condition cannot be sustained.

And, again, if a street railway exists partially upon private right of way and partially upon public streets, a private right of way is to be deemed a part of the plant, while the tracks upon the public streets are not. Whenever a public road crossed the railway upon its private right of way, the crossing, being a public highway, would not be part of the plant. In short, the railway would be segregated here and there into plant and non-plant. Great confusion thus results from such definition.

I should like to concur in the result and affirm the judgment, for in this case respondents were wrongdoers and appellant injured by their tortious act. The act was not intended to protect and insure a wrongdoer from the consequences of his tortious act. The act provides that an employee injured while away from the plant by such wrongdoer shall have the right to elect whether to take under the act or seek his remedy against such other, such election to be in advance of any suit; and if he elect to take compensation under the act, his cause of action would be assigned to the state for the benefit of the accident fund. These terms do not give the option or election to the wrongdoer to have determined at his instance whether he shall pay the injured person directly or the state, upon the assignment of the injured person.

The defense was that, under the compensation act, the court had no jurisdiction of the cause of action. The wrongdoer should not complain that he is held accountable directly by the injured party rather than by the state. In any case he can be held accountable but once for the same injury and damage. If I conscientiously could, I should insist that, in such a case as this, where the injury happened upon a public street and may have happened as well outside of the tracks of the street railway company as between them or upon them, under a broad interpretation of the act and proviso giving the right of election, the injured party may elect that, as to the wrongdoer other than the employer, the injury occurred away from the plant of the employer. But, as I see it, this cannot be done. The act gives the right of election only to the one injured "away from the plant." The plant and the system of a street railway are synonymous and are patently used interchangeably in the act. There is room for appropriate legislative amendment, but none for judicial legislation.

For these reasons, I must dissent.

MACKINTOSH, MOUNT, and CHADWICK, JJ., concur with HOLCOMB, J.

[No. 14209. *En Banc.* November 22, 1918.]

THE STATE OF WASHINGTON, *Appellant*, v. POSTAL TELEGRAPH-CABLE COMPANY, *Respondent*.[1]

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered November 25, 1916, in favor of the defendant, dismissing on the pleadings an action to recover premiums due under the provisions of the industrial insurance act. Reversed in part, and affirmed in part.

The Attorney General (*John H. Dunbar*, of counsel), for appellant.

O. L. Willett (*W. W. Cook*, of counsel), for respondent.

ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court adheres to the opinion heretofore filed herein as reported in 101 Wash. 630, 172 Pac. 902, and for the reasons there stated, the judgment is reversed.

[No. 14059. *En Banc.* November 22, 1918.]

G. W. LARUE *et al.*, *Respondents*, v. FARMERS & MECHANICS BANK, *Appellant*.[2]

Appeal from a judgment of the superior court for Spokane county, Girand, J., entered December 11, 1916, upon findings in favor of the plaintiffs, in an action on contract, tried to the court. Reversed.

Hurn & Hurn and *J. Webster Hancox*, for appellant.

McCroskey & Stotler and *John Pattison*, for respondents.

ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court adheres to the opinion heretofore filed herein as reported in 102 Wash. 434, 172 Pac. 1146, and for the reasons there stated, the judgment is reversed.

[1]Reported in 176 Pac. 346.

[2]Reported in 176 Pac. 331.

[No. 14826. *En Banc.* November 23, 1918.]

DAVID ROBINSON *et al.*, *Appellants*, v. C. R. WILSON *et al.*, *Respondents.*[1]

Appeal from a judgment of the superior court for Lewis county, Reynolds, J., entered July 9, 1917, upon findings in favor of the defendants, in an action for rent, tried to the court. Reversed.

Forney & Ponder, for appellants.

C. D. Cunningham and *W. H. Abel*, for respondents.

ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court adheres to the opinion heretofore filed herein as reported in 102 Wash. 528, 173 Pac. 331, and for the reasons there stated, the judgment is reversed.

[No. 13888. *En Banc.* November 25, 1918.]

WARREN GRIFFITH, *Respondent*, v. WASHINGTON WATER POWER COMPANY, *Appellant.*[2]

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered April 10, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee working on an electrical generator. Reversed.

Post, Russell, Carey & Higgins, for appellant.

Burcham & Blair, for respondent.

ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court adheres to the opinion heretofore filed herein as reported in 102 Wash. 78, 172 Pac. 822, and for the reasons there stated, the judgment is reversed.

[1]Reported in 176 Pac. 331.

[2]Reported in 176 Pac. 343.

[No. 14133. *En Banc.* November 26, 1918.]

VERA HUBBARD, *Appellant*, v. TACOMA EASTERN RAILROAD COMPANY, *Respondent*.[1]

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered October 2, 1916, dismissing an action for wrongful death, upon granting a nonsuit. Reversed.

G. E. Nolte and *Gordon & Easterday*, for appellant.
Geo. Korte and *Herbert S. Griggs*, for respondent.

ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court adheres to the opinion heretofore filed herein as reported in 101 Wash. 158, 172 Pac. 222, and for the reasons there stated, the judgment is reversed.

[No. 15011. Department One. December 28, 1918.]

THE STATE OF WASHINGTON, *Respondent*, v. JACK LEONARD *et al.*, *Appellants*.[2]

Appeal from a judgment of the superior court for King county, Gilliam, J., entered December 22, 1917, upon a trial and conviction of grand larceny. Affirmed.

Jerold Landon Finch, for appellants.
Alfred H. Lundin and *John D. Carmody*, for respondent.

MACKINTOSH, J.—Appellants were convicted of the crime of grand larceny, the information alleging that they had "received and aided in stealing and withholding" a certain automobile, knowing the same to have been stolen.

Their hope of escaping here the sentence imposed upon them rests upon three alleged errors occurring in the trial. They first contend that there was not sufficient evidence to go to the jury on the question of their knowledge that the automobile had been stolen. They concede that the state proved, even to their satisfaction, that the automobile had been stolen, and was in their possession when they were arrested, but they claim the proof was not as clear as is necessary that they knew it was stolen property. The second claim of error is that a new trial should have been granted because of their surprise at some testimony introduced in behalf of the state, and the third and last assignment is that certain testimony offered

[1]Reported in 176 Pac. 330.

[2]Reported in 177 Pac. 991.

by them was not admitted. We have read the entire statement of facts and find no merit in any of these assignments. All the essential elements of their guilt were established beyond a reasonable doubt after a fair trial; their hope of escaping from their sentences must now be to lean upon some other reed.

MAIN, C. J., CHADWICK, MITCHELL, and TOLMAN, JJ., concur.

[No. 14686. *En Banc.* January 6, 1919.]

F. G. NOYES, *as Receiver of the Washington-Alaska Bank, Appellant,* v. W. H. PARSONS *et al., Respondents.*[1]

Appeal from a judgment of the superior court for King county, Mitchell, J., entered July 23, 1917, upon sustaining a demurrer to the complaint, dismissing an action for equitable relief, tried to the court. Affirmed.

Hughes, McMicken, Ramsey & Rupp, DeJournal & DeJournal, and *Roy V. Nye,* for appellant.

Clise & Poe and *Peters & Powell,* for respondents.

HOLCOMB, J.—This is an action very similar in its issues to that of *Noyes v. Parsons, ante* p. 594, 177 Pac. 651.

It is not necessary to set out the issues tendered by the complaint, nor the grounds of relief stated therein. A demurrer was sustained by the trial court upon one of the grounds therein stated, namely, that the action was not commenced within the time limited by law, and the action was dismissed.

The same question of excuse by ignorance of a material fact is presented, and the same material fact, namely, the alleged illegality of the consolidation of the Washington corporation and the Nevada corporation, doing banking business at Fairbanks, Alaska, is relied upon in this as in the preceding case. This case being governed by our decision upon the preceding case as to the bar of the statute of limitations, the decision in this case will follow that.

Judgment affirmed.

MAIN, C. J., MOUNT, PARKER, and TOLMAN, JJ., concur.

MACKINTOSH and MITCHELL, JJ., being disqualified, took no part.

[1]Reported in 177 Pac. 654.

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1. CHATTEL MORTGAGES (1)—DISTINGUISHED FROM CONDITIONAL SALE—VALIDITY. Where an automobile was consigned to the purchaser subject to payment of draft attached to the bill of lading, one who advanced money to pay the draft, immediately delivering the bill of lading to the consignee who took possession of the car, cannot secure the advance by the giving and recording of a conditional bill of sale to the consignee, under the fiction of a sale to and resale by him; since it is not the office of a conditional bill of sale to secure money loaned without the formalities required of a chattel mortgage. *Lyon v. Nourse*..... 309

Checks:

Forgery of, see CRIMINAL LAW, 1, 4, 8, 13; FORGERY.

Child:

See GUARDIAN AND WARD.
Adoption of, see ADOPTION.

Cities:

See MUNICIPAL CORPORATIONS.

Claims:

Effect of assignment by debtor upon secured claims, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.
Against contractor's bond for money loaned contractor, see COUNTIES, 3.
Against county for tort, see COUNTIES, 6.
Mining claims, see MINES AND MINERALS.
Against property in hands of receiver, see RECEIVERS, 3.
Damages for wrongful detention of property conditionally sold as claim against estate of insolvent vendee, see SALES, 13.
Against school district, see SCHOOLS AND SCHOOL DISTRICTS, 1.

Cohabitation:

As raising presumption of valid ceremonial marriage, see MARRIAGE, 2.

Collateral Attack:

On decree in divorce proceedings, see DIVORCE, 1.

Collateral Security:

See PLEDGES.
Effect of acceptance of benefits under assignment for creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Collision:

Between vehicles on county road, see HIGHWAYS.

Between vehicles or with persons using streets, see MUNICIPAL CORPORATIONS, 6-8.

With person on or near street car track, see STREET RAILROADS.

Comment:

On evidence in charge to jury, see CRIMINAL LAW, 7, 8.

Commerce:

Carriage of goods and passengers, see CARRIERS.

Master's liability to servant employed by railway doing interstate business, see MASTER AND SERVANT, 1.

Commissions:

Of broker, see BROKERS.

Common Carriers:

See CARRIERS.

Common Law:

1. COMMON LAW (4)—OPERATION AND EFFECT—VENUE. Common law rules of procedure having been abolished by Rem. Code, § 153, our common law, preserved only when not inconsistent with the laws of the state by Id., § 143, is a rule of decision and not a rule of practice, and common law rules of practice as to venue cannot be allowed to defeat a right of action. *State ex rel. King County v. Superior Court, Pierce County*..... 268

Community Property:

In general, see HUSBAND AND WIFE.

Comparison:

Of handwriting of accused in prosecution for forgery, see CRIMINAL LAW, 4.

Compensation:

Of attorney, see ATTORNEY AND CLIENT, 6-8.

Of broker, see BROKERS.

Pecuniary compensation for injuries caused by unlawful acts of another, see DAMAGES.

For property taken for public use, see EMINENT DOMAIN.

Competency:

Of experts as witnesses, see EVIDENCE, 3.

Competition:

Restraining unfair competition by former employee, see INJUNCTION.

Complaint:

In civil action, see PLEADING.

Compromise and Settlement:

By guardian of controversy relating to ward's estate, see GUARDIAN AND WARD, 4.

Conclusion:

Of witness, see EVIDENCE, 3.
In pleading, see PLEADING, 1.

Condemnation:

Taking property for public use, see EMINENT DOMAIN.

Condition:

Precedent to right of creditors to share in reserve fund in contract for county highway work, see COUNTIES, 2.
Precedent to action by partnership, see PARTNERSHIP, 3, 4.

Conditional Sales:

See SALES, 3, 7-13.

Conditions:

Conditional tender, see TENDER.

Confidential Communications:

Restraining use of by former employee, see INJUNCTION.

Congress:

Qualifications of members of, see UNITED STATES.

Consent:

Of parent to adoption of child, see ADOPTION, 1.

Consideration:

For modification of contract, see CONTRACTS, 5.
Parol evidence to show, see EVIDENCE, 6, 7.
Of fraudulent conveyance, see FRAUDULENT CONVEYANCES.
Sufficiency of consideration to entitle party to specific performance of contract, see SPECIFIC PERFORMANCE, 3, 4.
For contract to devise, see WILLS, 2, 3.

Conspiracy:

Declarations of co-conspirators as evidence, see CRIMINAL LAW, 3.
Proximate or remote consequence of injury, see DAMAGES, 1.
To make arrest without warrant, see FALSE IMPRISONMENT, 2.

1. CONSPIRACY—CIVIL LIABILITY—JOINT TORT FEASORS. Where two or more persons enter into an unlawful conspiracy each is responsible for any act done by either in furtherance of the common de-

Conspiracy—Continued.

sign, and it is immaterial that the act was the result of a sudden impulse, when it followed in natural sequence in continuous succession of the events. *Mitchell v. Hughes*..... 231

Constables:

See SHERIFFS AND CONSTABLES.

Constitutional Law:

Regulating possession and sale of salmon during closed season as exercise of police power, see FISH, 1.

Qualifications of members of Congress, see UNITED STATES.

1. CONSTITUTIONAL LAW (85)—OBLIGATION OF CONTRACTS—EXEMPTION LAWS. An award to the widow on distribution of $3,000 under the act of 1917, pp. 670, 671, §§ 103 and 104, is not an impairment of the obligation of debts created by the decedent prior to the passage of that act, although it amends the existing law limiting the allowance to $1,000, where the residue of the estate going to the widow under the award was less than $1,000. *In re Lavenberg's Estate*..... 515

2. CONSTITUTIONAL LAW (126)—DUE PROCESS—DEPRIVATION OF PROPERTY—CORPORATE NAME. Laws 1917, p. 271, prohibiting the use of the word "trust" in the corporate name of a company not incorporated as a trust company, is not a taking of property without due process, as to existing corporations, in view of Const., art. 12, § 1, which provides that laws relating to corporations may be altered, amended or repealed at any time, and that corporations doing business in the state may be regulated, limited or restrained by law. *Union Trust Co. v. Moore*..... 50

Construction:

Of contracts, see CONTRACTS, 4, 6.

Of act relating to incorporation of trust companies, see CORPORATIONS, 1, 2.

Of statute making allowance to surviving wife, see EXECUTORS AND ADMINISTRATORS.

Of contract of guaranty, see GUARANTY.

Of policy providing for nonpayment of premiums on total disability of insured, see INSURANCE, 1.

Of contract of sale, see SALES, 1, 10, 11.

Of teacher's contract, see SCHOOLS AND SCHOOL DISTRICTS, 2.

Of statutes, see STATUTES.

Of findings and conclusions of court, see TRIAL, 4.

Contempt:

1. CONTEMPT (3)—PUBLICATIONS RELATING TO COURT PROCEEDINGS. Rem. Code, § 2372, subd. 7, providing that one who publishes a false or grossly inaccurate report of court proceedings shall be

Contempt—Continued.

guilty of a misdemeanor, designates a particular kind of criminal contempt, regardless of common law definitions; and an information plainly charging the same is not subject to demurrer. *State v. Angevine* 679

2. SAME (3)—PUBLICATIONS—PENDENCY OF PROCEEDINGS. In a prosecution for criminal contempt by publishing a false report of testimony that had already been given, the case was "pending" when the trial continued for several days after the publication. *State v. Angevine* 679

3. SAME (3)—PUBLICATIONS RELATING TO COURT—PENDENCY OF PROCEEDINGS. The publication of a false or grossly inaccurate report of the proceedings of a court is criminal contempt, within Rem. Code, § 2372, subd. 7, whether the proceedings are pending at the time of the publication or concluded prior thereto. *State v. Angevine* 679

4. SAME (22)—EVIDENCE—SUFFICIENCY. In a prosecution for criminal contempt by publishing a false report of court proceedings, the admission of the publication, and evidence of its gross inaccuracy and the synchronous pendency of the action, sustained a verdict, the weight and credibility of the evidence being for the jury. *State v. Angevine* 679

Contest:

Of will, see WILLS, 1.

Continuance:

Of criminal proceeding as affecting jurisdiction of police court in city of third class, see MUNICIPAL CORPORATIONS, 5.

Contractors:

On public work, see COUNTIES, 2, 3.

Contracts:

See GUARANTY.

Of carrier violating regulations, see CARRIERS, 1.

Remedy by appeal as bar to certiorari to secure injunctive relief from damages on breach of contract, see CERTIORARI, 2.

Impairing obligation, see CONSTITUTIONAL LAW, 1.

Involving parties holding entire stock, liability of corporation, see CORPORATIONS, 4.

Of counties, see COUNTIES, 1-3.

Estoppel to plead set-off as against assigned account, see ESTOPPEL.

Admission of parol or extrinsic evidence, see EVIDENCE, 4-10.

Agreements within statute of frauds, see FRAUDS, STATUTE OF.

Of husband or wife, see HUSBAND AND WIFE.

Of insurance in general, see INSURANCE.

Contracts—Continued.

Variance in action on contract for services of attorneys, see PLEADING, 2.
Of insolvent, see RECEIVERS, 2, 3.
Sales of personalty, see SALES.
Employment of teachers, see SCHOOLS AND SCHOOL DISTRICTS.
Specific performance, see SPECIFIC PERFORMANCE.
Sale of land, see VENDOR AND PURCHASER.
Licenses respecting water rights or privileges, see WATERS AND WATER COURSES, 2.
To devise, see WILLS, 2-5.
Implied obligation to pay for services rendered, see WORK AND LABOR.

1. CONTRACTS (4) — REQUISITES — MUTUALITY — SALES. A writing signed by C. reciting that he sells wheat to D. for future delivery at a certain price, to which D. wrote the word "confirmed" and signed it, is not unilateral or void for want of mutuality, but is a sale binding on both parties. *Dement Brothers Co. v. Coon*.... 603

2. CONTRACTS (36, 38)—REQUISITES—VALIDITY OF ASSENT—FRAUD—EVIDENCE—SUFFICIENCY. An engineer and contractor is not shown to have been guilty of fraud in securing a contract to furnish diagrams and steel for a building, by false representations as to the amount of steel required, where, upon invitation, he merely made a lump sum bid on the job, agreeing to furnish all the steel required, as shown by blue prints and drawings furnished to him, from which he estimated about 45 tons of steel would be needed, and from which any competent person could figure the amount required, subject to a variation of 10 per cent; although the job actually required but 39 or 40 tons. *Wheeler v. Pitwood*..... 1

3. CONTRACTS (41)—VALIDITY—PUBLIC POLICY—CONDITIONAL SALES. A conditional sales contract providing that the vendee shall pay five per cent on the contract price, in addition to costs and disbursements allowed in case of a successful action to recover the property, is void as against public policy. *Union Machinery & Supply Co. v. McCush*..... 62

4. CONTRACTS (57)—CONSTRUCTION—INTENT OF PARTIES. The most important rule for the construction of contracts is that the intent of the parties must govern, to be gathered from the contract as a whole and not from detached parts; and a clumsy arrangement of words, coupled with the "comma fault," will not contravene a reasonable interpretation according to the intention. *Wick v. Western Union Life Insurance Co*..... 129

5. CONTRACTS (104)—MODIFICATION—CONSIDERATION. Where a contract is based upon a sufficient consideration, it is enough to support a subsequent modification by a supplemental agreement. *Pacific Power & Light Co. v. White*..... 528

Contracts—Continued.

6. CONTRACTS (134)—CONSTRUCTION — BUILDING CONTRACT — "STOCK SHIPMENTS"—REASONABLE TIME. A contract by an engineer to furnish diagrams and structural steel for a building, which provided that he was to proceed at once to order the steel from a certain jobber, all steel to be "stock shipments," is complied with by ordering from the jobber, although a small portion had to be ordered by the jobber from the mill because not in stock, where it was all furnished within the reasonable time called for by the contract. *Wheeler v. Pitwood*..... 1

Contributory Negligence:

Of person injured by collision in street, see MUNICIPAL CORPORATIONS, 7, 8.

Of owner of goods injured from flooding by defective sewer, see MUNICIPAL CORPORATIONS, 12.

Of person struck by street car as question for jury, see STREET RAILROADS.

Conversion:

Wrongful conversion of personal property, see TROVER AND CONVERSION.

Conveyances:

See ASSIGNMENTS; ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Of personalty as security for debt, see CHATTEL MORTGAGES.

In fraud of creditors, see FRAUDULENT CONVEYANCES.

Mortgaged property, see MORTGAGES.

Corporations:

Laws prohibiting use of word "trust" in corporate name as taking of property without due process, see CONSTITUTIONAL LAW, 2.

Fraud of officers in sale of stock, see FRAUD, 2, 3.

Bar of action for fraud in sale of corporate debentures, see LIMITATION OF ACTIONS, 1.

1. CORPORATIONS (23)—CORPORATE NAME — RIGHT TO USE — "TRUST" COMPANY—STATUTES—CONSTRUCTION. A corporation the articles of which authorized it to engage in a trust business, cannot lawfully use the word "trust" in its corporate name, although it does not actually engage in a trust business, without complying with Laws 1917, ch. 80, p. 271, which defines what constitutes a banking or trust business, provides for the incorporation of banks and trust companies and for their supervision, imposes penalties not applicable to other corporations, and provides that no corporation shall engage in a trust business except as authorized by the act and that no corporation shall use the word "trust" in its corporate name except a corporation authorized by the laws of the state; since the

Corporations—Continued.

act was intended to put banks and trust companies in a distinct class with limited powers and new safeguards. *Union Trust Co. v. Moore* 50

2. SAME (23). The words "Trust Company" in such act are not ambiguous, and the phrase "authorized by laws of the state," was merely intended to differentiate between trust companies organized under the act and foreign trust companies authorized by the act to engage in a trust business, and not to authorize existing companies to continue the use of the trust name, if not engaged in a trust business without complying with the law. *Union Trust Co. v. Moore* 50

3. CORPORATIONS (81)—ACTIONS BETWEEN MEMBERS — LIMITATIONS—DISCOVERY OF FRAUD—DUTY OF OFFICERS. An officer of a corporation, suing fellow officers for fraud in misrepresenting the land values of the corporation, owes the duty of reasonable prudence in discovering the facts to start the running of the statute of limitations, and instructions to that effect need not invoke the rule that would be applicable in case plaintiff had been a stranger to the corporation or his fellow officers. *Mohney v. Davis*..... 209

4. CORPORATIONS (154)—POWERS AND LIABILITIES—REPRESENTATION—PERSONS HOLDING ENTIRE STOCK. A contract employing attorneys to defend an action for divorce, involving property held by a corporation organized by husband and wife for convenient handling, the defendant holding all but one share of the stock, need not be signed by the corporation, in order to authorize recovery against the husband and the corporation; since the corporate entity may be ignored in determining the rights of the stockholders. *Clark v. Schwaegler* 12

5. CORPORATIONS (207, 208)—INSOLVENCY—PREFERENCE—TRUST FUND DOCTRINE. Under the trust fund doctrine, a creditor of an insolvent corporation who in good faith purchases all the assets, assuming all debts under misrepresentations, is liable to the trustee in bankruptcy although not liable under the bankruptcy act; and is not protected by compliance with the sales in bulk statutes, Rem. Code, § 5296. *Williams v. Davidson*..... 315

6. SAME—EXTENT OF LIABILITY. In such case, the liability on securing the preference is limited to the *pro rata* share which excluded creditors would have been entitled to upon a ratable distribution of the assets. *Williams v. Davidson*..... 315

7. CORPORATIONS (263)—FOREIGN CORPORATIONS—ACTIONS—PROCESS—"AGENTS." The president of a local company contracting with a foreign corporation on a time and material basis to install gas engines sold to be installed in this state, is not the "agent" of the

Corporations—Continued.

foreign corporation for the purpose of service of process; the work of installation being mechanical only. *Alaska Pacific Navigation Co. v. Southwark Foundry & Machine Co.* 346

8. SAME (263). In such a case, a mechanical engineer loaned by the foreign corporation to the local company, under its contract, to supervise the installation of the gas engines, who was paid by and in the service of the local company, is not an "agent" for the purpose of making service of process upon the foreign corporation. *Alaska Pacific Navigation Co. v. Southwark Foundry & Machine Co.* 346

Costs:

Allowance of expert witness fees under workmen's compensation act, see MASTER AND SERVANT, 7.

In replevin against receiver for detention of property conditionally sold insolvent, see RECEIVERS; 2, 3.

1. COSTS (61, 72)—ON APPEAL—SUCCESSFUL PARTIES—APPORTIONMENT ON CROSS-APPEALS. Upon cross-appeals in a foreclosure suit, plaintiff, unsuccessful in all respects, is entitled to no costs; a second mortgagee, resisting plaintiff's claim, is entitled to costs therefor, but to no costs for an unsuccessful cross-appeal against other defendants; a successful lien claimant awarded superiority over all other parties is entitled to costs as part of his costs and disbursements in the foreclosure of his lien; and other lien claimants, successfully resisting plaintiff's claims, are entitled to costs as part of their foreclosure costs and disbursements; while the defendant mortgagors, having joined with the second mortgagee and incurred no costs apart from costs awarded to it, will be denied costs. *Andersonian Investment Co. v. Jones* 142

Counties:

Venue of action against for injury to real property, see VENUE.

1. COUNTIES (37) — CONTRACTS AND LIABILITY — MAINTENANCE OF FERRY—ULTRA VIRES. A county, being authorized by Rem. Code, § 5013, to conduct a ferry and collect tolls, the maintenance of approaches and landing places is not *ultra vires*, but is necessarily implied as part of the general power granted. *Hart v. King County* 485

2. COUNTIES (46)—HIGHWAYS (33)—CONTRACTOR'S BONDS—RESERVE FUND—RIGHTS OF CREDITORS AND SURETIES. The reserve fund withheld from contractors on county highway work as a trust fund for creditors of the contractor is also for the protection of his bondsmen; and materialmen furnishing supplies cannot participate in such reserve fund, as against the contractor's sureties, unless they served notice of delivery within ten days after the first delivery

Counties—Continued.

of the material, as required by Rem. Code, § 1159-1, as a condition precedent to liability therefor on the contractor's bond. *Denham v. Pioneer Sand & Gravel Co.* 357

3. COUNTIES (46)—CONTRACTS — CONTRACTOR'S BONDS—"STATUTES"—MONEY LOANED. A person loaning money to a contractor on county highway work, is not entitled to file a claim against the contractor's bond conditioned in the exact language of Rem. & Bal. Code, § 1159, to pay all laborers, mechanics, subcontractors, or materialmen and all persons supplying the contractor with provisions or supplies, "all just debts, dues and demands" incurred in the performance of the work; since the quoted words refer to the classes of persons named, and do not include creditors or persons loaning money. *American Savings Bank & Trust Co. v. National Surety Co.* 663

4. COUNTIES (56)—TORTS—LIABILITY—OPERATION OF FERRY. A county operating a ferry for hire under the authority of Rem. Code, § 5013, acts in its proprietary capacity, and is liable in damages for its acts and omissions as an individual engaged in a like enterprise. *Hart v. King County* 485

5. COUNTIES (93)—ACTIONS—CAPACITY TO BE SUED—VENUE — STATUTES. The effect of Rem. Code, § 951, giving a right of action against a county for injury by some act or omission of the county where none existed at common law, is to make the county answerable under the general rules of procedure in the superior courts, and liable thereunder to suits in other counties where the venue is local. *State ex rel. King County v. Superior Court, Pierce County* 268

6. SAME (100)—ACTIONS—PLEADING—NOTICE OF CLAIM. In a complaint against a county repeatedly referring to an accident on a county ferry approach in November, 1916, a charge that the county had notice of the defect long before November 30, 1917, is clearly a clerical error, and sufficiently pleads notice, as against a general demurrer. *Hart v. King County* 485

Courts:

Review of decisions, see APPEAL AND ERROR.

Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 18-20.

Disbarment proceedings, see ATTORNEY AND CLIENT, 1-5.

Common law as rule of decision, see COMMON LAW.

Contempt of court, see CONTEMPT.

Right to trial by jury, see JURY.

Jurisdiction of police courts, see MUNICIPAL CORPORATIONS, 4, 5.

Trial of civil actions, see TRIAL.

Crabs:

Possession of during closed season, see FISH, 2.

Creditors:

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; FRAUDULENT CONVEYANCES.

Preference in purchase of assets of insolvent corporation, see CORPORATIONS, 5, 6.

Right to participate in reserve fund in contract for county highway work, see COUNTIES, 2.

Criminal Law:

See FORGERY; HOMICIDE.

Authority to arrest person without warrant, see ARREST.

Offenses as ground for disbarment of attorney, see ATTORNEY AND CLIENT, 5.

Civil liability for conspiracy, see CONSPIRACY.

Contempt as criminal offense, see CONTEMPT.

Unlawful possession of fish or crabs during closed season, see FISH.

Sufficiency of information charging criminal anarchy, see INSURRECTION.

Violation of liquor laws, see INTOXICATING LIQUORS.

Violation of municipal ordinances, see MUNICIPAL CORPORATIONS, 4, 5.

Acts constituting blackmail, see THREATS.

Cross-examination of accused, see WITNESSES.

1. CRIMINAL LAW (54)—FORMER JEOPARDY—IDENTITY OF OFFENSES—FORGERY OF DIFFERENT CHECKS—IDENTIFICATION BY WITNESS. In a prosecution for forgery and altering one of two identical checks passed by the accused on the same day, the fact that the prosecuting witness, when on the stand, could not identify and state on which check the prosecution was based, does not operate as denial of the right to plead former jeopardy, where the check in suit had identifying marks, and the prosecuting attorney stated that the prosecution was based upon it. *State v. McGuff*..... 501

2. SAME (139)—HEARSAY—UNOFFICIAL REPORTS. In a prosecution for criminal anarchy by a member of the I. W. W., the report of an unofficial organization or mediation commission appointed by the President of the United States, not connected with the I. W. W., as to its aims and purposes is not admissible, the witness not testifying as to an investigation or report that he had made himself. *State v. Lowery*..... 520

3. CRIMINAL LAW (140)—EVIDENCE—EXECUTION OF COMMON PURPOSE—CRIMINAL ANARCHY—PROPAGANDA. In a prosecution for criminal anarchy by a member of the I. W. W., propaganda issued by authority of the order, some taken from the defendant, is admissible for

Criminal Law—Continued.

the purpose of showing the aims and methods of the organization and to prove that it was bent on forcibly and anarchistically overthrowing the government of the United States, and also as declarations of co-conspirators engaged with the defendant, who was shown to be not only associated with but a member of the order. *State v. Lowery* 520

4. SAME (159)—EVIDENCE (218)—COMPARISON OF HANDWRITING. In a prosecution for forgery, a bank officer who had never seen the accused write or paid any of his checks, cannot give his opinion that the accused had written and signed the check, based upon a comparison of the handwriting with an unauthenticated bank identification card from the bank's filing system, containing the purported signature of the accused. *State v. McGuff*..... 501

5. SAME (197)—TRIAL—INDORSEMENT OF NAMES OF WITNESSES. The names of witnesses used by the state in rebuttal need not be indorsed on the information. *State v. Lowery*..... 520

6. CRIMINAL LAW (229)—HOMICIDE (88)—TRIAL—RECEPTION OF EVIDENCE—SCOPE OF REBUTTAL. Where the accused testified to a conversation had with the deceased just prior to the killing, it is proper rebuttal for the state to call the wife of the deceased and give deceased's account of the conversation repeated to her in his dying declaration, under a sense of impending death. *State v. Walker* 472

7. SAME (255)—TRIAL—INSTRUCTIONS—COMMENT ON EVIDENCE. In a prosecution for murder, a request to instruct the jury to consider the intoxicated condition of the deceased at the time he was shot, as bearing upon the weight to be given to his dying declaration made three days later, is properly refused as a comment on the evidence. *State v. Palmer*..... 396

8. SAME (259-262)—TRIAL—INSTRUCTIONS—COMMENTS—ASSUMPTIONS. In a prosecution for forgery, an instruction to the jury, if they find that defendant passed the check with intent to defraud, will not be held as a comment upon or an assumption of the facts, where it could not have misled the jury, and the passing was not a matter in issue. *State v. McGuff*..... 501

9. CRIMINAL LAW (314)—HOMICIDE (95)—TRIAL—NECESSITY OF PARTICULAR INSTRUCTIONS—DYING DECLARATIONS. It is not error to fail to instruct that dying declarations should be received with caution, in the absence of any request therefor; there being a wide distinction between misdirection and nondirection, where the charge is not mandatory by statute. *State v. Walker*..... 472

10. CRIMINAL LAW (316)—TRIAL—INSTRUCTIONS ALREADY GIVEN. Error cannot be assigned upon the refusal of requested instructions where

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the instructions given fairly covered the subject. *State v. Palmer* 396

11. CRIMINAL LAW (387)—APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS TO EVIDENCE. Error cannot be predicated on the failure to lay sufficient foundation for a dying declaration, in the absence of any objection to the evidence upon that ground. *State v. Walker* 472

12. CRIMINAL LAW (448)—APPEAL—HARMLESS ERROR—RECEPTION OF EVIDENCE. Error of a harmless nature in the reception of evidence in a murder case does not justify a reversal. *State v. Palmer*.. 396

13. CRIMINAL LAW (452)—APPEAL—HARMLESS ERROR—INSTRUCTIONS. An instruction as to forgery, putting a greater burden on the state than called for, is not prejudicial to defendant. *State v. McGuff* 501

Cross-Appeals:

Apportionment of costs on, see COSTS.

Cross-Examination:

See WITNESSES.

Crossings:

Apportionment of cost of interlocking devices at grade crossing, see RAILROADS.

Accident at street railroad crossings, see STREET RAILROADS.

Custody:

Support and custody of children, see DIVORCE.

Customers:

Enjoining soliciting of customers by former employee, see INJUNCTION.

Damages:

Harmless error in instructions as to measure of, see APPEAL AND ERROR, 16, 17.

Liability of company to innocent holder of bill of lading, see CARRIERS, 2.

Remedy by appeal as bar to certiorari to secure injunctive relief from damages on breach of contract, see CERTIORARI, 2.

Liability of county for in operation of ferry, see COUNTIES, 4.

Condemnation of property taken for public use, see EMINENT DOMAIN.

Unlawful detainer, see LANDLORD AND TENANT, 4.

Torts by municipality, see MUNICIPAL CORPORATIONS, 11, 12.

In replevin against receiver of insolvent vendee in conditional sales contract, see RECEIVERS, 1.

Upon counterclaim for breach of warranty, see SALES, 4, 5.

Damages—Continued.

For detention after default of property conditionally sold, see SALES, 12, 13.

In actions for specific performance of contracts, see SPECIFIC PERFORMANCE, 1.

For breach of contract to purchase land, see VENDOR AND PURCHASER, 3, 6.

1. DAMAGES (9-11)—GROUNDS—PROXIMATE OR REMOTE CONSEQUENCES—SHOOTING IN CONSPIRACY FOR UNLAWFUL ARREST. Where an innocent traveler on the highway was shot by one of a party of officers who had unlawfully combined to stop travelers in an attempt to find and arrest without warrant some person violating the prohibition law, the unlawful combination was the proximate cause of the injury, whether the shooting was wanton or not; and it is immaterial that the shooting was not agreed upon by the conspirators in advance. *Mitchell v. Hughes*..... 231

2. DAMAGES (79)—EXCESSIVE DAMAGES—PASSION OR PREJUDICE. A verdict for $1,000 for a malicious assault by a servant does not alone reflect passion or prejudice where plaintiff was painfully injured. *De Leon v. Doyhof Fish Products Co*..... 337

Dams:

Liability of city for negligent construction of in city park, see MUNICIPAL CORPORATIONS, 11.

Death:

Cause of death in action on accident insurance policy, see INSURANCE, 2.

Debt:

Validity of oral promise to pay debt of another, see FRAUDS, STATUTE OF, 1.

Secured by mortgage for future advances, see MORTGAGES, 1.

Debtor and Creditor:

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY; FRAUDULENT CONVEYANCES.

Decedents:

Estates, see EXECUTORS AND ADMINISTRATORS.

Deceit:

See FRAUD.

Decision:

On appeal as law of case, see APPEAL AND ERROR, 18-20.

Declarations:

As evidence in criminal prosecutions, see CRIMINAL LAW, 3.
Dying declarations, see HOMICIDE, 5.

Deeds:

Parol evidence to show consideration for, see EVIDENCE, 7.
In fraud of creditors, see FRAUDULENT CONVEYANCES.
Reformation, see REFORMATION OF INSTRUMENTS.

Default:

For nonpayment of premium on account of total disability, see INSURANCE, 1.
Vacation of default judgment, see JUDGMENT.
Of vendee in conditional sale contract, see SALES, 12, 13.

Deficiency:

In amount of timber on lands conveyed, see VENDOR AND PURCHASER, 4.

Delivery:

Of goods sold, see SALES, 2, 6.

Demand:

For performance as affecting accrual of action, see SPECIFIC PERFORMANCE, 7.

Dependents:

Who are dependents under industrial insurance act, see MASTER AND SERVANT, 5.

Devises:

See WILLS.
Specific performance of contract to devise, see SPECIFIC PERFORMANCE, 4, 5.

Directing Verdict:

In civil actions, see TRIAL, 2.

Disbarment:

Of attorney, see ATTORNEY AND CLIENT, 2-5.

Discharge:

School teacher, see SCHOOLS AND SCHOOL DISTRICTS, 1, 3.

Discovery:

Of fraud as affecting limitation of action, see LIMITATION OF ACTIONS, 1, 2.

Discretion:

Of public service commission in apportioning costs of interlocking devices at grade crossing, see RAILROADS.

Discretion of Court:

Vacation of default judgment, see JUDGMENT, 2, 3.

Discrimination:

By carrier, see CARRIERS, 1.

Dismissal and Nonsuit:

Dismissal of appeal, see APPEAL AND ERROR, 3.

Distress:

For taxes, see TAXATION, 2.

Divorce:

Marriage by divorced person within time prohibited by decree, see MARRIAGE, 1, 3-5.

Annulment of marriage, see MARRIAGE, 3-5.

1. DIVORCE (50, 83)—COLLATERAL ATTACK—SUPPORT OF CHILD. Where a decree of divorce did not provide for the maintenance of a child awarded to the mother, and she waged a separate action to recover therefor, a defense therein that the original decree did not properly express the conclusion of the court, asking modification thereof, is a collateral attack upon that decree and cannot be entertained. *Hilleware v. Hilleware*..... 361

2. DIVORCE (99)—CUSTODY AND SUPPORT OF CHILDREN—AGREEMENTS OF PARTIES—EFFECT. A separation agreement providing for the custody and support of children and that the parties should not interfere with each other is avoided where the husband thereafter interfered with the wife, making threats to kill her; and the court in granting a divorce is not bound by the separation agreement. *Badolato v. Badolato*..... 194

Documents:

As evidence in criminal prosecutions, see CRIMINAL LAW, 3.

Dormant Partners:

See PARTNERSHIP, 1.

Drainage:

Injury to adjoining owner by drainage of waters of lake, see WATERS AND WATER COURSES.

Drains:

Improvement of stream by drainage district as affecting right to drive and float logs, see LOGS AND LOGGING.

Due Process of Law:

See CONSTITUTIONAL LAW, 2.

Duplicity:

In information charging forgery, see FORGERY.

Duress:

In execution of will, see WILLS, 1.

Dying Declarations:

See HOMICIDE, 5.

Cautionary instructions as to, see CRIMINAL LAW, 9.

Ejectment:

Recovery of mineral lands, see MINES AND MINERALS, 2.

Election:

Assignment of conditional sale contract as election to vest title in vendee, see SALES, 8.

Eminent Domain:

1. EMINENT DOMAIN (76)—MEASURE OF DAMAGES—BENEFITS FROM IMPROVEMENT. Upon condemnation for an army post, the measure of damages is the fair cash market value of the property without regard to any benefits that may result from the establishment of the post. *Pierce County ex rel. Bellingham v. Duffy*..... 426

Employees:

See MASTER AND SERVANT.

Employers' Liability Act:

See MASTER AND SERVANT, 1.

Equity:

See INJUNCTION; REFORMATION OF INSTRUMENTS; SPECIFIC PERFORMANCE.

Equitable estoppel, see ESTOPPEL.

Estates:

Estates of deceased persons, see EXECUTORS AND ADMINISTRATORS.

Estoppel:

To allege error in civil actions or proceedings, see APPEAL AND ERROR, 10.

Possession and conduct of business by tenant as making oral lease good for definite term, see LANDLORD AND TENANT, 2.

To deny partnership, see PARTNERSHIP, 1.

Estoppel—Continued.

1. ESTOPPEL (15, 35-39)—ELEMENTS OF EQUITABLE ESTOPPEL—APPARENT TITLE—SET-OFF—ASSIGNED ACCOUNT. Where a creditor of a logging company, by a written contract, purchased a raft of logs from its debtor, for "spot cash," without any reservation of its right to the logs or an accounting, appreciating the legal effect of the contract, which it may have made with mental reservations for the purpose of obtaining possession of the logs, and the debtor immediately sold the account to a bank holding its notes, the creditor is estopped to withhold the cash or plead a set-off as against the bank; since the doctrine of equitable estoppel applies as in the case of one who negligently causes another to rely on acts to its prejudice; notwithstanding the bank had knowledge of the previous situation of the parties to the sale, both of whom were liable on the notes held. *National Bank of Tacoma v. Puget Sound Lumber Co.* 363

2. SAME. In such a case, attaching a draft for acceptance, not called for or mentioned in the contract, is not a suspicious circumstance calculated to put the buyer upon inquiry, as against the unqualified promise to pay cash. *National Bank of Tacoma v. Puget Sound Lumber Co.* 363

3. SAME (63-65)—PLEADING—SUFFICIENCY OF ALLEGATIONS. The failure to plead an estoppel is not fatal, in view of Rem. Code, § 1752, requiring the disregard of technicalities and the considering of amendments as made, where both sides in fact relied upon an estoppel and both had set out the facts with the technical fault of omitting to state the legal conclusion of the estoppel; there having been a trial on the merits and no claim of surprise. *National Bank of Tacoma v. Puget Sound Lumber Co.* 363

Eviction:

Of tenant, see LANDLORD AND TENANT, 3.

Evidence:

Waiver of objections as to rulings on, see APPEAL AND ERROR, 10.
Review of ruling as dependent on prejudicial nature of error, see APPEAL AND ERROR, 13, 14.
For attorney's fee, see ATTORNEY AND CLIENT, 6-8.
In action for broker's compensation, see BROKERS.
To sustain prosecution for contempt in publishing false report of court proceedings, see CONTEMPT, 4.
Of fraud in securing contract, see CONTRACTS, 2.
In criminal prosecutions, see CRIMINAL LAW, 2-4, 6, 12.
Reception at trial in general, see CRIMINAL LAW, 6.
Harmless error in reception of, see CRIMINAL LAW, 12.
Admissibility to show title, see FORCIBLE ENTRY AND DETAINER.

Evidence—Continued.

Of fraudulent conveyance, see FRAUDULENT CONVEYANCES.
In prosecution for murder, see HOMICIDE, 2-5.
For injunction, see INJUNCTION, 2.
Cause of death in action on accident insurance policy, see INSURANCE, 2.
Of marriage, see MARRIAGE, 2.
For injuries to servant, see MASTER AND SERVANT, 6, 9.
For money lent, see MONEY LENT.
Negligence of driver of motor truck, see MUNICIPAL CORPORATIONS, 6.
Failure of proof of capacity to sue, see PARTNERSHIP, 3.
Existence of agency, see PRINCIPAL AND AGENT, 1, 2.
Motion to strike out evidence, see TRIAL, 1.
In conversion, see TROVER AND CONVERSION, 2.
Testamentary capacity, see WILLS, 1.
Of consideration for contract to devise, see WILLS, 3.
Competency, attendance, credibility and examination of witnesses, see WITNESSES.

1. EVIDENCE (68) — BEST AND SECONDARY — FACTS EVIDENCED BY WRITINGS. The continuous interstate shipment of live stock may be shown by the testimony of a witness accompanying the shipment, in the absence of the original waybills, which cannot be regarded as the better evidence. *Northern Pac. R. Co. v. Longmire* 121

2. EVIDENCE (92)—TRIAL (16)—ADMISSIONS BY AGENT. An admission stated to the court by plaintiff's general manager, made during the trial to clear up some confusion in his testimony, is binding upon the plaintiff. *Woolworth Co. v. Seattle*..... 629

3. EVIDENCE (103-108)—HEARSAY—EXPERTS. The evidence of experts on land values is inadmissible and prejudicial where their estimates, as far as timber and improvements were concerned, were based on the estimates of other experts who were not called to testify. *Pierce County ex rel. Bellingham v. Duffy*..... 426

4. EVIDENCE (153)—PAROL EVIDENCE TO VARY WRITING—RECEIPTS—AMBIGUITY. Unilateral letters or receipts are not conclusively binding and admit of parol evidence to explain the meaning of the words, "$775 to be credited on account." *Hanson v. Roesch*... 257

5. EVIDENCE (153)—PAROL TO VARY WRITING—RECEIPT. A receipt or release is not a contract or evidence of a contract and may be explained or contradicted by parol evidence. *Pickering v. Roeder* 539

6. EVIDENCE (157)—PAROL EVIDENCE—CONSIDERATION. It is competent to prove by parol that a will was executed in consideration of a written agreement for life support, although the papers did not refer one to the other. *Alexander v. Lewes*..... 32

Evidence—Continued.

7. SAME (157)—NATURE OF CONSIDERATION. Parol evidence is admissible to show that the consideration for deeds and written instruments was to be held in trust for the holder of, and credited upon, the notes of the grantors. *Hanson v. Roesch*..... 257

8. EVIDENCE (168, 175)—PAROL TO VARY WRITING—PRIOR AGREEMENTS —AMBIGUITY. Previous correspondence and evidence of negotiations leading up to a contract for the sale of lumber is not admissible, where there was a complete unambiguous contract by correspondence whereby plaintiff refused to accept defendant's first order but submitted a confirmation order that was accepted by defendant, and the previous correspondence could throw no light on the terms of the agreement made. *Deer Park Lumber Co. v. Oregon-Washington Lumber & Manufacturing Co*..... 531

9. EVIDENCE (169)—PAROL EVIDENCE TO VARY WRITING—PRIOR ORAL AGREEMENT—TIME FOR PERFORMANCE. Where a written contract to furnish material for a building did not specify the time for delivery, a reasonable time will be implied, and evidence of a prior oral agreement is inadmissible to vary the construction legally implied from the writing itself. *Wheeler v. Pitwood*..... 1

10. EVIDENCE (175-179)—PAROL EVIDENCE TO VARY WRITING—AMBIGUITY—SCHOOL TEACHER'S CONTRACT. A teacher's contract allowing excuse from work in the summer school without providing the conditions of such excuse, and providing that the conditions of services as heretofore existing will prevail the coming year, is so ambiguous as to admit of parol evidence that it had been the custom to excuse a teacher only upon his or her request. *Norton v. State* 248

Examination:

Of witnesses in general, see WITNESSES.

Exceptions:

Necessity for exceptions for purpose of review, see APPEAL AND ERROR, 1, 2.

Excessive Damages:

See DAMAGES, 2.

Excuse:

Notice of total disability as excuse for nonpayment of premium, see INSURANCE, 1.

For failure to deliver, see SALES, 2.

Executors and Administrators:

Allowance to widow as impairment of obligation of debts of decedent created prior to act, see CONSTITUTIONAL LAW, 1.

Executors and Administrators—Continued.

1. EXECUTORS AND ADMINISTRATORS (59)—STATUTES (5)—CONTINUATIONS—ALLOWANCE TO SURVIVING WIFE. Although Rem. Code, § 1464, restricting a widow's allowance to $1,000 was repealed by the probate code of 1917 without saving existing rights, Laws 1917, pp. 670, 671, §§ 103 and 104, making the allowance $3,000 will be treated as a rewriting or amendment of existing laws, in view of Id., § 219, which provides that the court shall have full power and authority to settle the estate in any case where the provisions of the act are inapplicable or doubtful. *In re Lavenberg's Estate*..... 515

2. EXECUTORS AND ADMINISTRATORS (60)—ALLOWANCE TO SURVIVING WIFE—NONRESIDENTS—STATUTES. A nonresident widow is entitled to the allowance of $3,000, under Laws 1917, pp. 670, 671, §§ 103, 104, providing that the home, household goods and property not exceeding $3,000 shall be set aside to the widow; since the law is not strictly a homestead or exemption law, but is based on charity to prevent dependency and is to be liberally construed; the widow being in no sense a contending party as to creditors. *In re Lavenberg's Estate* 515

Exemptions:

Exemption laws as impairing obligation of contracts, see CONSTITUTIONAL LAW, 1.

Allowance to surviving wife from estate of decedent, see EXECUTORS AND ADMINISTRATORS.

Expenses:

Of litigation, in action of replevin against receiver, see RECEIVERS, 3.

Right of vendor to recover on default of vendee in conditional sale contract, see SALES, 10, 11.

Expert Testimony:

Testimony in civil actions, see EVIDENCE, 3.

Allowance of fees to expert witnesses under workmen's compensation act, see MASTER AND SERVANT, 7.

Extortion:

See THREATS.

False Imprisonment:

1. FALSE IMPRISONMENT (4)—ARREST WITHOUT WARRANT—CIVIL LIABILITY—DEFENSES. Neither the good intentions of an officer nor the advice of his attorney is a defense to a civil action for damages for making an unwarranted arrest for misdemeanor without warrant. *Mitchell v. Hughes*..... 231

2. FALSE IMPRISONMENT (4)—CIVIL LIABILITY—DEFENSES. It is no defense to an action for unlawful conspiracy by officers to stop

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travelers on the highway to make arrest for misdemeanor without warrant, that plaintiffs exceeded the speed limit in attempting to escape from supposed highwaymen. *Mitchell v. Hughes*..... 231

Fees:

Attorney, see ATTORNEY AND CLIENT, 6-8.

Allowance of expert witness fees under workmen's compensation act, see MASTER AND SERVANT, 7.

Ferries:

Injury to passenger on ferry approach, see CARRIERS, 3-8.

Maintenance and control of by counties, see COUNTIES, 1, 4.

Filing:

Statement of facts in lower court, see APPEAL AND ERROR, 5, 6.

Findings:

Review as dependent on exception in lower court, see APPEAL AND ERROR, 2.

By court, see TRIAL, 3, 4.

Fish:

1. FISH (5) — STATUTORY PROVISIONS — POSSESSION DURING CLOSED SEASON. Laws of 1917, p. 799, § 16, making it unlawful to possess or deal in salmon during the closed season cannot be sustained as a valid exercise of the police power for the protection of salmon, in view of the proviso to the act providing that the act shall not apply to salmon taken beyond the three-mile limit outside the straits of Juan de Fuca; since the proviso defeats the purpose which is the one justification of such legislation. *State v. Belknap* 221

2. FISH (18)—OFFENSES — UNLAWFUL POSSESSION OF CRABS—STATUTES. The possession of crabs, in cold storage, either for the purpose of sale during the closed season or later, is unlawful after July 5, under Rem. Code, § 5150-101, making it unlawful to have possession of crabs for the purpose of sale during the months of July, August and September, with the proviso that it shall be lawful to have in possession crabs caught in June until the 5th day of July. *State v. Ripley*..... 299

Flowage:

Injuries by flowage of water, see WATERS AND WATER COURSES.

Forcible Entry and Detainer:

1. FORCIBLE ENTRY AND DETAINER (3, 10) — DEFENSES — EVIDENCE — POSSESSION AND TITLE. In an action of forcible entry and detainer, evidence is admissible that the premises actually used by defend-

Forcible Entry and Detainer—Continued.

ants, although inclosed in plaintiffs' fences, did not belong to them, because not a part of the lands described in the complaint or notice to vacate, and the same defeats the action. *Cohen v. McKenna Lumber Co.* 245

Foreclosure:

Of mechanics' lien, see MECHANICS' LIENS, 5.

Foreign Corporations:

Service of process on agent of, see CORPORATIONS, 7, 8.

Forgery:

See CRIMINAL LAW, 1, 4, 8, 13.

1. FORGERY (4)—INFORMATION—DUPLICITY. An information for forgery is not duplicitous in charging the forgery of a check with intent to defraud and of knowingly uttering the check with intent to defraud, as parts of one connected act continuous in point of time. *State v. McGuff*..... 501

2. SAME (4). An information charging that accused feloniously forged a check imports an intent to defraud. *State v. McGuff*.. 501

Former Jeopardy:

Denial of plea of former jeopardy, see CRIMINAL LAW, 1.

Fraud:

As ground for disbarment of attorney, see ATTORNEY AND CLIENT, 3, 4.
Validity of assent to contracts, see CONTRACTS, 2.
Action between officers for fraud, limitations, see CORPORATIONS, 3.
Conveyances in fraud of creditors, see FRAUDULENT CONVEYANCES.
Bar of action by limitation, see LIMITATION OF ACTIONS.
As ground for rescission, see VENDOR AND PURCHASER, 2.

1. FRAUD (4)—EXPRESSION OF OPINION. Representations and assurances by a trustee for creditors, and purchasers from it, given to the debtor's parents to whom he was indebted for services and money loaned, whereby the parents were induced not to file claims with the trustee, do not constitute actionable fraud, where, at most, they amounted only to expressions of opinion that the business would pay all creditors and leave sufficient to the son to pay them, especially where it seems they were largely actuated by a desire to aid their son by withholding their claims. *Kirkland v. Dressel* 668

2. FRAUD (11-1)—ACTIONS—DEFENSES. In an action by an officer of a corporation against fellow officers for fraud in the sale of stock, there can be no recovery where there was no evidence that

Fraud—Continued.

the defendants made or authorized any of the representations inducing the purchase, all of which were made by a third person. *Mohney v. Davis*..... 209

3. SAME (11-1). In an action for fraud in the sale of stock by misrepresenting the value of certain corporate lands, plaintiff cannot complain that the corporation obtained no title because the purchase was in fraud of the government, where the government had taken no steps to challenge or set aside the title. *Mohney v. Davis* 209

Frauds, Statute of:

Specific performance of contracts partly performed, see SPECIFIC PERFORMANCE, 3.

1. FRAUDS, STATUTE OF (1)—CONTRACT TO ANSWER FOR DEBT OF ANOTHER. Oral promises by a trustee for creditors that claims would be paid in full fall within the inhibition of the statute of frauds. *Kirkland v. Dressel*..... 668

2. FRAUDS, STATUTE OF (11)—LEASES—MORE THAN ONE YEAR. A lease for one year, although executed within the month prior to its taking effect, is not a lease for more than one year, within Rem. Code, § 8802, requiring such leases to be acknowledged. *Pappas v. General Market Co*..... 116

3. FRAUDS, STATUTE OF (37)—MEMORANDUM—STATEMENT OF TERMS—TIME FOR PAYMENT. The failure of a contract for the sale of wheat for future delivery, to fix the time for payment, does not render it void under the statute of frauds; since in such case the law provides that payment and delivery shall be concurrent acts. *Dement Brothers Co. v. Coon*..... 603

4. SAME (37). There is a sufficient compliance with the statute of frauds on the sale of wheat, payment to be made on delivery of warehouse receipts, where the memorandum of sale fixed the future delivery at one of two places to be chosen by the seller, but was silent as to time for payment, making payment and delivery concurrent acts; since the production of warehouse receipts would serve as proof of delivery according to the terms of the contract. *Dement Brothers Co. v. Coon*..... 603

Fraudulent Conveyances:

Preference to creditors by insolvent, see BANKRUPTCY.

Bar of action to set aside transfer of assets to other bank, see LIMITATION OF ACTIONS, 2.

1. FRAUDULENT CONVEYANCES (92, 97)—TRANSACTION BETWEEN RELATIVES—PREFERENCE—CONSIDERATION—EVIDENCE—SUFFICIENCY. Transfers by a failing debtor of all his available resources to his daughter

Fraudulent Conveyances—Continued.

in consideration of a previous promise to pay her $25 a month as housekeeper during the previous five years, are shown to be fraudulent as to creditors, where the proof of the agreement was not satisfactory and it appears that the property was worth considerably more than his daughter's claim, and he continued to exercise dominion over it, negotiating a mortgage upon it and offering part of it to a creditor in settlement of the indebtedness; since preference to one in such relation requires satisfactory proof of good faith and consideration, subject to the closest scrutiny. *Fisher v. Ward* 589

Future Advances:

Priority of architects' lien over mortgage for future advances, see MECHANICS' LIENS, 2.

Debts secured under mortgage for future advances, see MORTGAGES, 1.

Gifts:

Specific performance of promise to convey land, see SPECIFIC PERFORMANCE, 3, 7.

Governmental Powers:

Of port district, see MUNICIPAL CORPORATIONS, 1-3.

Guaranty:

1. GUARANTY (9)—CONSTRUCTION OF CONTRACT—EXTENT OF LIABILITY. Where parties for whom boats were being built took over the work upon the inability of the builder to complete his contracts, agreeing to pay all debts for material and labor, and credit was thereafter extended on the faith thereof, the indebtedness became the joint and several indebtedness of the builder and promisor for which both were liable. *McGillivray v. Columbia Salmon Co*..... 623

Guardian and Ward:

1. GUARDIAN AND WARD—APPOINTMENT BY WILL — VALIDITY — STATUTES—REPEAL. The act of 1860, Rem. Code, § 1643, providing that the father may by will appoint a guardian for his minor children, was repealed by the act of 1879, Rem. Code, § 5932, providing that, upon the father's death, the mother shall come into as complete control of the children as the father does in case of the mother's death; and makes such a provision in a father's will void. *In re Hogen* 265

2. SAME—APPOINTMENT—MOTHER. The appointment of a mother as guardian of minor children upon the death of the father is proper where she was a suitable and proper person and there was no showing to the contrary. *In re Hogen*..... 265

Guardian and Ward—Continued.

3. SAME—APPOINTMENT—NECESSITY OF PROPERTY. Where a father left his property to trustees for the benefit of minor children until they became of age, no guardian of their estate can be appointed, since the record discloses no estate belonging to the minors. *In re Hogen* 265

4. GUARDIAN AND WARD—TERMINATION OF RELATION—EFFECT OF MAJORITY. An order, entered without notice, authorizing a guardian to compromise a suit instituted by the ward after he became of age, is void, under Rem. Code, §§ 1631 and 1636, providing that the trust expires when the ward becomes twenty-one and making it the guardian's duty to then account for all the estate remaining in his hands. *Lyons v. McElroy*..... 481

Handwriting:

Opinion evidence identifying signatures, see CRIMINAL LAW, 4.

Harmless Error:

In civil actions, see APPEAL AND ERROR, 12-17.
In criminal prosecutions, see CRIMINAL LAW, 12, 13.

Hearsay Evidence:

In criminal prosecutions, see CRIMINAL LAW, 2.
In civil actions, see EVIDENCE, 3.

Highways:

Unlawful arrest of traveler, without warrant, see FALSE IMPRISONMENT.
Civil liability for negligence in attempt to arrest travelers without warrant, see SHERIFFS AND CONSTABLES.

1. HIGHWAYS (53, 57)—USE FOR TRAVEL—NEGLIGENCE — MEETINGS—TURNING TO LEFT. Under Rem. Code, § 5562-26, requiring persons on meeting, to seasonably turn to the right of the center of the highway, it is negligence, which was the proximate cause of the accident, for the driver of a truck, already to the left of the center, to suddenly swerve to the left and strike the rear of an approaching auto that was at the extreme right of a level road fifty feet wide. *Paton v. Cashmere Warehouse & Storage Co*..... 414

Holder in Due Course:

See BILLS AND NOTES.

Homicide:

Scope of evidence in rebuttal, see CRIMINAL LAW, 6.
Comment on evidence in charge to jury, see CRIMINAL LAW, 7.
Cautionary instructions as to dying declarations, see CRIMINAL LAW, 9.

Homicide—Continued.

1. HOMICIDE (5, 6)—MANSLAUGHTER—ELEMENTS—KILLING WITH DESIGN—STATUTES. Under Rem. Code, §§ 2392-2395, defining murder in the first degree as the killing with premeditated design to effect the death of the person killed, murder in the second degree as the killing with such design but without premeditation, and manslaughter as every other killing not excusable or justifiable, killing with a design to effect death is murder and the element of manslaughter is excluded, even if under provocation or sudden heat of passion. *State v. Palmer* 396

2. HOMICIDE (46)—EVIDENCE—ADMISSIBILITY—OTHER OFFENSE. In a prosecution for murder, in which the testimony necessarily showed that two persons had been shot and had subsequently died and the jury was thoroughly familiar with the fact, it is not error to refuse to strike the testimony of the killing of the second victim. *State v. Palmer* 396

3. SAME (48). In a prosecution for murder, in which it appears that two persons were shot by the accused, evidence as to the wounds on the body of the second victim, for whose killing accused had been acquitted, may have been competent as to the direction of the shots fired by accused. *State v. Palmer*..... 396

4. SAME (62)—EVIDENCE—ADMISSIBILITY — PREVIOUS THREATS — REMOTENESS. Upon an issue of self-defense, evidence of threats against the accused made ten years before, and testified to by a witness who had not lived in the neighborhood for seven years, are too ancient to be admissible. *State v. Palmer*..... 396

5. HOMICIDE (67)—EVIDENCE—ADMISSIBILITY — DYING DECLARATIONS —ATTENDING CIRCUMSTANCES. Oral testimony of the circumstances under which a dying declaration, taken down and subscribed in due form when made, is admissible as explanatory. *State v. Palmer* 396

6. SAME (94, 121)—TRIAL—ABSENCE OF EVIDENCE OF MANSLAUGHTER. On a plea of self-defense, accused is not entitled to an instruction on the subject of manslaughter, where there was no evidence to show facts within the statutory definition of manslaughter. *State v. Palmer* 396

7. SAME (118) — TRIAL — INSTRUCTIONS — GRADE OR DEGREE — MANSLAUGHTER. Under a plea of self-defense, admitting that the killing was with a design to kill, the accused is guilty of murder or not guilty and is not entitled to an instruction on the subject of manslaughter, as defined by Rem. Code, § 2395. *State v. Palmer*... 396

Husband and Wife:

Divorce and judicial separation, see DIVORCE.
Rights of survivor, see EXECUTORS AND ADMINISTRATORS.
Marriage and annulment thereof, see MARRIAGE.

Husband and Wife—Continued.

1. HUSBAND AND WIFE (61)—COMMUNITY PROPERTY—CONTRACTS BY HUSBAND. Where shares of corporate stock were community property, they were the proper subject of contract by the husband, contracting on behalf of the community in the employment of attorneys. *Roche v. Madar* 21

Ice:

Extent of authority of port district to manufacture ice, see MUNICIPAL CORPORATIONS, 1-3.

Identification:

Failure of witness to identify check as denial of right to plead former jeopardy, see CRIMINAL LAW, 1.

Identity:

Of offense under plea of former jeopardy, see CRIMINAL LAW, 1.

Implied Contracts:

See WORK AND LABOR.

Improvements:

As part performance of oral contract to convey, see SPECIFIC PERFORMANCE, 3.

Incorporation:

Of trust companies, see CORPORATIONS, 1, 2.

Indemnity:

See GUARANTY.

Legislative construction of act relating to contractor's bonds, see STATUTES, 2.

Indictment and Information:

See FORGERY.

In prosecution for publishing false report of court proceedings, see CONTEMPT, 1.

Indorsement of witnesses on information, see CRIMINAL LAW, 5.

Sufficiency of information charging criminal anarchy, see INSURRECTION.

Indorsement:

Of bill or promissory note, see BILLS AND NOTES.

Of names of witnesses on information, see CRIMINAL LAW, 5.

Industrial Insurance:

See MASTER AND SERVANT, 1, 5-7.

Infants:

See GUARDIAN AND WARD.
Adoption of, see ADOPTION.
Custody and support on divorce of parents, see DIVORCE.

Injunction:

Review by appeal of order denying temporary injunction as bar to certiorari, see CERTIORARI.
Right of drainage commissioners to injunction against driving and floating logs on improved stream, see LOGS AND LOGGING.

1. INJUNCTION (16) — TRADE SECRETS — SOLICITING CUSTOMERS BY FORMER EMPLOYEE. Equity will grant an injunction against the solicitation by a former manager, of the customers of a loan, real estate, and insurance agency, where he used his personal acquaintance with the customers and his knowledge of the agency's business and confidential matters as a reason for transferring their patronage to a competitor. *Davis & Co. v. Miller*..... 444

2. SAME (52)—ACTIONS—EVIDENCE—ADMISSIBILITY. In an action to enjoin the solicitation by a former manager of the customers of a loan, real estate, and insurance agency, it is error to exclude evidence of daily confidential meetings showing defendant's relation to plaintiff's business and the knowledge that he had acquired of it and of the customers while employed by it. *Davis & Co. v. Miller* 444

Insolvency:

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY.
Preferences by insolvent corporation, see CORPORATIONS, 5, 6.
Preference as fraudulent conveyance, see FRAUDULENT CONVEYANCES.

Instructions:

Review as dependent on exception in lower court, see APPEAL AND ERROR, 1.
Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 12, 15-17.
In criminal prosecutions, see CRIMINAL LAW, 7-10, 13; HOMICIDE, 6, 7.

Insurance:

1. INSURANCE (103) — NONPAYMENT OF PREMIUM — EXCUSES — CONSTRUCTION OF POLICY—NOTICE OF DISABILITY. Notice of total disability must be given prior to default and cancellation for nonpayment of premiums, under a policy of life insurance, providing that if the insured, before attaining the age of sixty, shall furnish proof that he "has," before default, become wholly disabled, the company shall pay for him all premiums "which shall become due" during the continuance of the disability; especially in view of other provisions of the policy requiring insured, upon request, to give proof

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of continuance of the disability, and limiting the period of grace for payments to one month pursuant to Rem. Code, § 6059-184, during which time the policy "shall remain in full force and effect." *Wick v. Western Union Life Insurance Co*..... 129

2. INSURANCE (128, 185)—ACCIDENT INSURANCE—CAUSE OF DEATH—"EXTERNAL, VIOLENT AND ACCIDENTAL MEANS"—EVIDENCE—SUFFICIENCY. The death of insured, who had previously been in perfect health, is sufficiently shown to have been caused by "external, violent and accidental means" within the terms of an accident policy, rather than by diabetes or disease, where it appears that he was struck on the back and bruised, and the bruise developed a carbuncle and infection from which he died, notwithstanding that, after the accident, there were symptoms of diabetes which a physician gave as a direct or contributing cause, where diabetes was more probably caused by the injury than that death resulted from disease. *Day v. Great Eastern Casualty Co*..... 575

Insurrection:

Evidence in prosecution for criminal anarchy, see CRIMINAL LAW, 2, 3.

1. INSURRECTION—CRIMINAL ANARCHY—INFORMATION—SUFFICIENCY. An information sufficiently charges criminal anarchy where it alleges in concise language the violation of Rem. Code, § 2563, subds. 1 and 4, by advocating the overthrow of organized government by unlawful means, to wit, the organization of the Industrial Workers of the World whose purpose was the anarchistic overthrow of the government, and that defendant was a member of and had voluntarily assembled with the organization for such purpose. *State v. Lowery* 520

Intent:

Of parties to contract as affecting construction, see CONTRACTS, 4.
To defraud, see FORGERY, 2.
Of mortgagors as to advances secured by mortgage, see MORTGAGES, 1.
Of legislature in enacting statute, see STATUTES, 3.

Intoxicating Liquors:

Liability of officers in attempt to arrest on highway without warrant persons transporting liquor, see SHERIFFS AND CONSTABLES.

1. INTOXICATING LIQUORS (29, 30)—REGULATION—TRANSPORTATION AND POSSESSION. The possession of less than a pint of whiskey in an automobile is not necessarily unlawful, especially when knowledge of its presence is not shown. *Mitchell v. Hughes*..... 231

2. INTOXICATING LIQUORS (53)—SEARCHES AND SEIZURES—RECLAIMING SHIPMENT—EXPIRATION OF PERMIT. After a shipment of intoxicating

Intoxicating Liquors—Continued.

liquor to a druggist has been seized as contraband, the time limit for delivery having expired, the shipper cannot rescind the sale, interrupt the transit, and claim the liquor for reshipment out of the state, in view of Rem. Code, § 6262-17, providing that the permit shall be void at the expiration of thirty days, and making it unlawful for the carrier to transport any liquor without a valid permit. *State v. Twenty Barrels of Whiskey*..... 382

3. INTOXICATING LIQUORS (53) — SEARCHES AND SEIZURES — BOATS — STATUTES. A boat on which intoxicating liquors are found is not subject to seizure and forfeiture by a justice of the peace, under Rem. Code, § 6262-11, providing for the seizure and forfeiture by justices of the peace of all "implements, furniture and fixtures" used or kept for the illegal sale of intoxicating liquors; in view of Id., § 6262-5, providing that premises, buildings, vehicles or boats unlawfully used may be abated as nuisances by action to be brought in the superior court, and may be released upon bond. *Van Bug Fish Co. v. Herstrom*..... 545

Joint Tort Feasors:

Civil liability for conspiracy, see CONSPIRACY.

Judges:

Conduct of judge in criminal trial, see CRIMINAL LAW, 7, 8.
Eligibility for membership in Congress, see UNITED STATES.

Judgment:

Review in general, see APPEAL AND ERROR.
Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 18-20.
On decree of divorce, see DIVORCE, 1.
Against tenant for unlawful detainer, see LANDLORD AND TENANT, 4.
Notwithstanding verdict, see TRIAL, 3.
In action for price of land sold, see VENDOR AND PURCHASER, 5.

1. JUDGMENT (29)—DEFAULT—WAIVER. Acceptance of the $25 paid as a condition for the vacation of a default judgment estops the plaintiff from contesting the order of vacation. *Mount Vernon National Bank v. First National Bank of Monroe*..... 107

2. JUDGMENT (36)—DEFAULT—VACATION—DISCRETION. The vacation of a default judgment rests in the discretion of the trial court, and it is not an abuse of discretion to vacate a default writ of prohibition if erroneously granted. *State ex rel. Kiggins v. Hadley*... 648

3. SAME (41, 99)—DEFAULT—VACATION—DISCRETION. It is not an abuse of discretion to vacate a default judgment on account of mistake and inadvertence of the cashier of defendant bank in making a note of the return day beyond the time when an answer should

Judgment—Continued.

have been made, and the mistake of the clerk in filing the answer in another cause. *Mount Vernon National Bank v. First National Bank of Monroe*..... 107

4. JUDGMENT (118)—VACATION—NATURE AND FORM OF PROCEEDING. The vacation of a default judgment for mistake and inadvertence in properly noting the return day may be had on motion, and need not be by petition as provided in Rem. Code, § 467. *Mount Vernon National Bank v. First National Bank of Monroe*..... 107

Jurisdiction:

Of police court in cities of third class, see MUNICIPAL CORPORATIONS, 4, 5.

Jury:

Instructions in criminal prosecutions, see CRIMINAL LAW, 7-10, 13.
Taking case or question from jury at trial, see TRIAL, 3.

1. JURY (8)—RIGHT TO JURY TRIAL—RECOVERY OF MINING CLAIM. In an action involving conflicting claims to unpatented mining claims, defendants are entitled to a jury trial where they alleged ownership and right of possession and that they were wrongfully deprived of possession by plaintiff, which had committed waste. *Oroville International Salts Co. v. Rayburn*..... 137

Knowledge:

Of fraud as affecting limitation, see LIMITATION OF ACTIONS, 1, 2.
Servant's knowledge of defect or danger as element of assumption of risk by servant, see MASTER AND SERVANT, 3.

Labor:

Implied contracts to pay for services, see WORK AND LABOR.

Laches:

As bar to action for fraud, see LIMITATION OF ACTIONS, 1.
As defense to particular actions or proceedings, see REFORMATION OF INSTRUMENTS.
In suit to enforce specific performance, see SPECIFIC PERFORMANCE, 6.

Lakes:

Right of landowner to remove natural barrier and permit discharge of waters on land of adjoining owner, see WATERS AND WATER COURSES.

Landlord and Tenant:

Requirements of statute of frauds as to leases, see FRAUDS, STATUTE OF, 2.

Landlord and Tenant—Continued.

1. LANDLORD AND TENANT (42)—ORAL LEASE—MONTH TO MONTH—STATUTE. Rem. Code, § 8802, providing that leases may be in writing or print and shall be valid for any term not exceeding one year without acknowledgment, witnesses, or seal, has no application to an oral lease, which can be sustained only as a lease from month to month. *Armstrong v. Burkett*..... 476

2. SAME (42)—ORAL LEASE—ESTOPPEL. The mere possession, payment of rent, building up and conducting of a business in the usual way for the sole benefit of the tenant, does not make an oral lease good for a definite term, on the theory of estoppel, without some further benefit to the landlord or injustice to the tenant. *Armstrong v. Burkett*..... 476

3. LANDLORD AND TENANT (87) — EVICTION — ACTS CONSTITUTING — AGREEMENTS. A market stall tenant cannot recover for eviction, if, being unable to pay rent, he agreed to move into a cheaper stall prepared for him, and refused to vacate on notice to quit. *Pappas v. General Market Co*..... 116

4. SAME (147)—FORCIBLE ENTRY AND DETAINER—DOUBLE DAMAGES. In an action for unlawful detainer by a tenant, Rem. Code, § 827, authorizes judgment for double the amount of rent accrued; notwithstanding the defendant tendered and paid into court the amount due up to the time of trial, contesting only the landlord's right to reenter. *Armstrong v. Burkett*..... 476

Law of the Case:

Decision on appeal, see APPEAL AND ERROR, 18-20.

Law of the Road:

Violation of, see HIGHWAYS.

Leases:

See LANDLORD AND TENANT.

Of state mineral land, see MINES AND MINERALS, 1.

Legislature:

Legislative construction of act relating to contractor's bonds, see STATUTES, 2.

Licenses:

Respecting water rights or privileges, see WATERS AND WATER COURSES, 2.

Liens:

Priorities between mechanics' lien and other liens and claims, see MECHANICS' LIENS, 2-4.

Mortgage liens, see MORTGAGES.

Pledge, see PLEDGES.

Life Insurance:

See INSURANCE, 1.

Limitation of Actions:

For fraud of co-officers in representing value of corporate lands, see CORPORATIONS, 3.

To enforce mechanics' lien, see MECHANICS' LIENS, 5.

To reform instruments, see REFORMATION OF INSTRUMENTS.

Suits for specific performance, see SPECIFIC PERFORMANCE, 7.

1. LIMITATION OF ACTIONS (56-58) — DISCOVERY OF FRAUD — LACHES. An action for the rescission of the sale of corporate debentures or certificates, misrepresented to be preferred stock, is barred by laches and the statute of limitations, Rem. Code, § 159, subd. 4, limiting actions for relief on the ground of fraud to three years after discovery of the fraud, where the purchase was made in 1907 and action was not commenced until 1915, the certificate on its face recited that it was for "Preferred Rights" issued under a certain by-law referred to and made a part of it, and was neither capital stock nor an incumbrance on real estate and the purchaser was a woman of experience and a skillful investor who could not have been misled and could not have misunderstood the contents of the instrument upon a casual reading of it. *Johnston v. Spokane & Inland Empire R. Co*..... 562

2. LIMITATION OF ACTIONS (56-58) — DISCOVERY OF FRAUD — OPPORTUNITY FOR DISCOVERY. An action by a receiver, suing on behalf of creditors to set aside as fraudulent a consolidation or transfer of all the assets of one bank to another, is barred by the statute of limitations, Rem. Code, § 159, subd. 4, limiting actions for relief upon the ground of fraud to three years after discovery of the fraud, where the transfer was void as violative of the common law and of the law of the state wherein the grantee bank was incorporated, and such fact was or should have been known to the creditors and to the receiver upon his appointment upon acquiring knowledge of the consolidation, which was more than three years prior to the commencement of the action; since he and the creditors were thereupon immediately charged with notice of the illegality as a fact incapable of concealment, or discoverable with ordinary diligence. *Noyes v. Parsons*..... 594

3. SAME (83) — PLEADING — MATTERS AVOIDING BAR — DISCOVERY OF FRAUD. In an action for relief upon the ground of fraud, in pleading want of knowledge and excusatory facts for delay in bringing the action, a general allegation of ignorance at one time and knowledge at another is not sufficient, but the pleader must set forth the facts constituting impediment to an earlier prosecution of the claim. *Noyes v. Parsons*..... 594

Loans:

Claims against contractor's bond for money loaned contractor, see COUNTIES, 3.

Recovery of money loaned, see MONEY LENT.

Local Actions:

See VENUE.

Logs and Logging:

Estoppel of creditor on purchase of logs from debtor to plead set-off as against assigned account, see ESTOPPEL.

Sale of personal property of logging company for taxes, see TAXATION.

1. LOGS AND LOGGING (5)—DRIVING AND FLOATING LOGS—RIGHT TO USE STREAM—EFFECT ON DRAINAGE. Where a stream, which has been improved by a drainage district, had been capable, during the annual periods of high water, of being profitably used for floating logs and timber products to market, the drainage commissioners are not entitled to an injunction against the use of the stream and banks for continuous floatage of logs by natural methods, even if objectionable to riparian rights; but only to relief against such holding, storing and accumulation of logs and timber products as will interfere with the fitness of the stream for drainage purposes by the silting of the channel and causing bars not due to natural conditions. *Drainage District No. 3 of King County v. Machias Mill Co.* 493

Maintenance:

Allowance to surviving wife, see EXECUTORS AND ADMINISTRATORS.

Manslaughter:

See HOMICIDE, 1, 6, 7.

Marriage:

1. MARRIAGE (5)—PERSONS WHO MAY MARRY—DIVORCED PERSON. A marriage within the six months prohibited by the divorce, outside of the jurisdiction where the parties went for that purpose and immediately returning without intent to change their domicile, is void. *Knoll v. Knoll*..... 110

2. MARRIAGE (11, 14)—BY COHABITATION AND REPUTATION—PRESUMPTIONS—EVIDENCE. A presumption of lawful marriage from holding out and cohabitation cannot be indulged where the proofs show that the parties, unable to speak or read English, relied upon applications and affidavits for a marriage license which they paid for and supposed constituted a lawful marriage, no license ever having been issued or ceremony performed. *Meton v. Industrial Insurance Department* 652

Marriage—Continued.

3. SAME (17)—ANNULMENT—GROUNDS—MISTAKE OF LAW AND FACT. Where plaintiff in a divorce case, after trial believed in good faith that a decree of divorce was entered, and within six months married in a foreign jurisdiction honestly believing that such marriage would be valid, her mistake of fact and law was in no sense meretricious, and authorizes the court to annul the marriage at her suit. *Knoll v. Knoll*..... 110

4. MARRIAGE (17)—ANNULMENT — GROUNDS — INVALID MARRIAGE. A void marriage contracted in another state in violation of a decree of divorce and of Rem. Code, § 991, prohibiting remarriage for a period of six months, should be annulled in accordance with the public policy of the state, no matter how undeserving the parties may be. *Hahn v. Hahn*..... 227

5. SAME (21) — ANNULMENT — PROPERTY RIGHTS. Upon the annulment of a void marriage, in no sense meretricious but entered into in good faith, the courts will treat the relation as a partnership as to all property acquired by the joint efforts of the parties while living together as husband and wife, the wife having assisted in the business, earned part of her personal expenses, and faithfully performed the duties of a housewife. *Knoll v. Knoll*..... 110

Master and Servant:

Measure of damages for assault by servant, see DAMAGES, 2.

Enjoining soliciting of customers by former employee, see INJUNCTION.

Liability of municipality for injuries by officers and employees, see MUNICIPAL CORPORATIONS, 9, 10.

1. MASTER AND SERVANT (20-1)—LIABILITY FOR INJURY TO SERVANT—WORKMEN'S COMPENSATION—ACT EXEMPTING INTERSTATE RAILWAYS—CONSTRUCTION. Under the amendment (Laws 1917, p. 96, § 18; Rem. Code, § 6604-18) providing that the workmen's compensation act shall not apply to employees of railways doing interstate, foreign, and intrastate commerce, and substituting therefor the liability imposed by the Federal employers' liability act, it is immaterial whether an injured employee was engaged in intrastate or interstate commerce, if any portion of the railroad's business is interstate; it being the intention to classify employers and render them liable under the Federal act regardless of the nature of the work. *Spokane & Inland Empire R. Co. v. Wilson*..... 171

2. MASTER AND SERVANT (35, 167)—INJURY TO SERVANT—NEGLIGENCE—CUSTOMARY APPLIANCES—INSTRUCTIONS. In an action for personal injuries sustained by a cook on a vessel in using simple steps in common use, the defendant is entitled to instructions as to the simplicity of the device, and that an employer using apparatus which is in common and ordinary use in the same line of business

Master and Servant—Continued.

is not liable for an accident which might have been prevented by the use of different apparatus. *Haines v. Coastwise Steamship & Barge Co.* 685

3. MASTER AND SERVANT (98, 99)—ASSUMPTION OF RISKS—OBVIOUS DANGERS—SIMPLE APPLIANCES. A seaman on a vessel, directed to use steps of simple construction such as are used on all American vessels, with which he was familiar, assumes the risks from the fact that they were out of position and unfastened, where that condition was open and obvious even to the most heedless. *Haines v. Coastwise Steamship & Barge Co.* 685

4. SAME (90, 99)—ASSUMPTION OF RISKS—SIMPLE TOOLS—NOTICE. While a steel "snap" for heading rivets with a soft end for striking is a simple tool, when the foreman took it to the blacksmith to change the cup end, and had it hardened at the hammer end and made dangerous it was his duty to notify the riveting crew; and plaintiff, injured when it broke at the first blow of the hammer, did not assume the risk, and was not required to make a careful examination to see if it was safe; there being evidence that the defect was not apparent from casual observation. *Randall v. Gerrick* 422

5. MASTER AND SERVANT (121-2)—WORKMEN'S COMPENSATION ACT—"DEPENDENTS"—"WIDOW." One who lived with deceased as his wife, believing herself to be lawfully married, is not a "dependent" of the deceased, as defined by the workmen's compensation act, Rem. Code, § 6604-3, specifying "widows" and certain relatives as within the definition. *Meton v. Industrial Insurance Department*.... 652

6. MASTER AND SERVANT (121-2)—INJURIES TO SERVANT—ACTIONS—REMEDIES UNDER WORKMEN'S COMPENSATION ACT—EVIDENCE—SUFFICIENCY. A finding of total partial disability in the loss of one eye as the result of an injury is sustained by evidence that the claimant's eyesight was good before the accident and began to fail shortly after, coupled with the opinion of reputable oculists that the condition may have resulted from the accident. *Nelson v. Industrial Insurance Department* 204

7. SAME (121-2)—COSTS—EXPERT WITNESS FEES. Costs and witness fees being purely statutory, the court has no discretion to allow extraordinary fees to expert witnesses under the workmen's compensation act, Rem. Code, § 6604-20, which authorizes the court to allow a reasonable attorney's fee and the "fees of medical and other witnesses," out of the administration fund. *Nelson v. Industrial Insurance Department* 204

8. MASTER AND SERVANT (122-1—129)—ACTIONS — COMPLAINT — ASSAULT BY SERVANT. A complaint for assault upon an employee by the master's superintendent fairly raises the question whether he

Master and Servant—Continued.

was at the time acting within the scope of his employment, where it is alleged that acting as superintendent, with power of supervision over the men, he accosted plaintiff while employed, falsely accused him of inciting a strike, and wantonly and maliciously struck him. *De Leon v. Doyhof Fish Products Co*..... 337

9. MASTER AND SERVANT (145, 155) — INJURY TO SERVANT — NEGLIGENCE—SAFE TOOLS—SUFFICIENCY OF EVIDENCE. Where a steel "snap" for heading rivets, with a soft end, was taken to the blacksmith by the foreman, and there was evidence that it was tempered on its return, and broke and injured the plaintiff on the first blow of the hammer, there was sufficient evidence to go to the jury on the question of whether the soft end had been tempered by the blacksmith. *Randall v. Gerrick*..... 422

10. SAME (159)—INJURIES TO SERVANT—CAUSE OF INJURY—QUESTION FOR JURY. In an action by an injured seaman, his testimony that he requested to be put ashore at the nearest port, and evidence that his injury was aggravated by a continuance of the voyage, makes a question for the jury upon such issue, even though the evidence was meager and contradicted. *Haines v. Coastwise Steamship & Barge Co.* 685

11. SAME (172, 174-1)—ASSAULT BY SERVANT—LIABILITY — SCOPE OF EMPLOYMENT. Where a superintendent was placed in charge of a distant cannery with general power to maintain discipline at his own discretion, which he abused in the exercise of his authority, when he lost his temper and committed a malicious assault upon an employee whom he sought to discipline, the master is liable. *De Leon v. Doyhof Fish Products Co*..... 337

Measure of Damages:

See DAMAGES, 2.

Harmless error in instructions as to, see APPEAL AND ERROR, 16, 17.

For property taken for public use, see EMINENT DOMAIN.

Against receiver for detention of property conditionally sold to insolvent, see RECEIVERS, 1.

Upon counterclaim for breach of warranty, see SALES, 4, 5.

Mechanics' Liens:

1. MECHANICS' LIENS (8)—INTEREST SUBJECT—REMOVAL OF BUILDINGS —RIGHTS OF MORTGAGEE. Rem. Code, § 1146, providing for the removal and sale from the land of property subject to a mechanics' lien, in case title to the land cannot be subjected thereto, has application only to cases where the work or material was furnished at the instance of the owner of less than the fee, and not to liens placed by the owner of premises subject to prior mortgages. *Gile Investment Co. v. Fisher*..... 613

Mechanics' Liens—Continued.

2. MECHANICS' LIENS (71)—PRIORITY—MORTGAGES—FOR FUTURE ADVANCES. Under Rem. Code, § 1132, giving a preference to mechanics' liens over any mortgage which may attach subsequently to the time of the commencement of the labor, an architect's lien upon a building is superior to a mortgage for future advances, where the mortgagee had previous notice that the architect had already commenced to perform labor upon the plans and specifications and would continue as architect and superintendent of construction. *Andersonian Investment Co. v. Jones* 142

3. SAME (71). Where a second mortgage was subject to a mortgage for $25,000 to secure future advances for the construction of a building, which sum was ample to pay all liens, but only $13,125 was advanced, resulting in liens for labor and materials, equity and good conscience requires that the liens be substituted as superior liens in place of the first mortgage to the extent of $25,000, although some of the labor was furnished after the giving of the second mortgage; since the second mortgagee had the benefit of the construction secured by the first mortgage. *Andersonian Investment Co. v. Jones* 142

4. SAME (71)—PRIORITIES—MORTGAGES. Where liens have expired by limitation as to a prior mortgagee, who was not made a party to the lien foreclosure, on foreclosure of the mortgage the lienholders can assert no priority over the mortgage by virtue of execution sales under their lien foreclosures. *Gile Investment Co. v. Fisher* 613

5. MECHANICS' LIENS (83)—FORECLOSURE—LIMITATIONS. Where mechanics' liens that were subsequent to a mortgage were foreclosed without making the mortgagee a party, he is not bound, and the liens expire if suit is not commenced within the eight months limited by Rem. Code, § 1138. *Gile Investment Co. v. Fisher*..... 613

Memoranda:

Required by statute of frauds, see FRAUDS, STATUTE OF, 3, 4.

Mental Capacity:

To execute a will, see WILLS, 1.

Mines and Minerals:

Right to jury trial in action to recover mining claim, see JURY.

1. MINES AND MINERALS (1-A)—LEASE OF STATE LANDS—STATUTES—CONSTRUCTION—IMPLIED REPEALS. Laws 1917, p. 599, amending Rem. Code, § 6783, as to applications for lease of state lands for mining purposes, so as to require the application to be made by legal subdivisions according to the public land surveys, impliedly repeals other provisions of the law requiring, as a condition precedent to

Mines and Minerals—Continued.

a lease, that the applicant set corner posts and post location notices as required for the location of mineral claims upon the government domain. *State ex rel. Sims v. Savidge*..... 79

2. MINES AND MINERALS (12) — ACTIONS TO RECOVER POSSESSION — TITLE. In possessory actions to recover unpatented mining claims, the better title prevails, the rule in ejectment for recovery on the strength of one's own title not applying. *Oroville International Salts Co. v. Rayburn*..... 137

Misappropriation:

By attorney, ground for suspension or disbarment, see ATTORNEY AND CLIENT, 1, 3, 4.

Misconduct:

Of attorney, ground for disbarment, see ATTORNEY AND CLIENT, 2-5.
Of trial judge, see CRIMINAL LAW, 7, 8.

Misrepresentation:

See FRAUD.
Affecting validity of contract for sale of land, see VENDOR AND PURCHASER, 2.

Mistake:

As ground for vacation of default judgment, see JUDGMENT, 3.
Ground for reformation of instrument, see REFORMATION OF INSTRUMENTS.

Modification:

Of contract, see CONTRACTS, 5.

Money Lent:

1. MONEY LENT (2)—VOLUNTARY PAYMENTS—EVIDENCE—SUFFICIENCY. Where a waterway company had agreed to sell to a bank all certificates issued for filling tide lands, and advanced the first delinquent installment to pay holders of negotiated certificates, the money could be recovered after the bank foreclosed the certificates for the full amount, when the preponderance of the evidence was to the effect that the advance was made at the bank's request to maintain the credit of similar certificates, under an agreement that it would be returned when collected from the source primarily liable. *Seattle & Lake Washington Waterway Co. v. Richards*..... 328

Money Paid:

Capacity of agent to sue for, see PRINCIPAL AND AGENT, 3.
Recovery of money paid on contract for land, see VENDOR AND PURCHASER, 1, 6.

Money Received:

Recovery of price paid for land, see VENDOR AND PURCHASER, 1, 6.

1. MONEY RECEIVED (6)—PERSONS LIABLE. Defendant is liable for money had and received where, by altering the receipt, he obtained possession from a bank messenger of money conditionally tendered, and refused to perform the conditions. *Bank of California National Association v. Mortgage Company, Holland-America* 196

Month:

Tenancy from month to month, see LANDLORD AND TENANT, 1.

Mortgages:

Of personal property, see CHATTEL MORTGAGES.

Costs on cross-appeals in foreclosure suit, see COSTS.

Right to remove buildings on property of owner subject to prior mortgages, see MECHANICS' LIENS, 1.

Priority as between mortgage and mechanics' lien, see MECHANICS' LIENS, 2-4.

Conversion by pledgee of mortgage, see TROVER AND CONVERSION, 2.

1. MORTGAGES (8)—DEBTS SECURED — FUTURE ADVANCES — INTENT — FAILURE TO ADVANCE. Where a mortgage was given for $25,000 to secure advances for the construction of a building, but the mortgagee advanced thereon but $13,125, and it appears that $10,000 was loaned to the constructor of the building on its personal credit and promissory note, under an agreement that such sum and $2,000 additional be expended on the building before any part of the $25,000 should be advanced, and the mortgagors were not parties to such agreement, it was not the intention to make the $10,000 an advance secured by the mortgage, and the mortgagee has a lien only for the sums actually advanced. *Andersonian Investment Co. v. Jones* 142

2. MORTGAGES (124-1)—PARTIAL RELEASE. Under a mortgage providing for partial releases upon recording a plat and the sale of lots, there can be no right to releases where the plat was not "placed on record" as stipulated in the mortgage. *Gile Investment Co. v. Fisher*..... 613

Motions:

To strike out evidence, see TRIAL, 1.

For direction of verdict, see TRIAL, 2.

Municipal Corporations:

Collision of street cars with persons or vehicles on track, see STREET RAILROADS.

1. MUNICIPAL CORPORATIONS (22, 23) — GOVERNMENTAL POWERS — AUTHORITY TO MANUFACTURE ICE. Laws of 1917, p. 498, § 1, empower-

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ing port districts to maintain and operate "warehouses, storehouses, elevators, grain-bins, cold storage plants, terminal icing plants . . ." authorizes the manufacture and sale of ice only as connected with the general scheme of its public business as a warehouseman for preserving shipments cared for or shipped at its docks and terminals; and does not grant power to build a plant and engage in manufacture largely in excess of its needs and to sell to others engaged in retailing ice. *State ex rel. Hill v. Port of Seattle* 634

2. SAME (22). Such power cannot be sustained on the theory that it may build in reasonable anticipation of future needs, where it built deliberately in excess of any demand that might be made within any reasonable future time, especially in view of the fact that ice plants can be built in units and added to as necessary. *State ex rel. Hill v. Port of Seattle*..... 634

3. SAME (22). Ice is not a by-product of a cold storage plant, notwithstanding the ice manufacturing machinery may be run by the same power as the refrigerating plant. *State ex rel. Hill v. Port of Seattle* 634

4. MUNICIPAL CORPORATIONS (333)—VIOLATION OF ORDINANCE—JURISDICTION—POLICE COURT—VENUE. Rem. Code, § 1756, requiring actions to be brought in justice court in the city or town where one or more of the defendants reside has no application to a prosecution for the violation of an ordinance of a city of the third class, jurisdiction of which is exclusively vested in the police judge of the city by Id., § 7671-29. *State ex rel. Kiggins v. Hadley*..... 648

5. SAME (333)—JURISDICTION—POLICE COURT—CONTINUANCE. A police judge in cities of the third class does not lose jurisdiction of a criminal proceeding for the violation of a city ordinance by a continuance for more than sixty days, under Rem. Code, § 1847, which applies only to civil actions; in view of the fact that Rem. & Bal. Code, § 7700, providing that proceedings before police justices shall be governed by general laws was expressly repealed by Rem. Code, § 7671-35, conferring exclusive jurisdiction upon police justices in such cases. *State ex rel. Kiggins v. Hadley*..... 648

6. SAME (379, 389)—USE OF STREETS—CROSSINGS AND PASSING—NEGLIGENCE—EVIDENCE—SUFFICIENCY. The jury is warranted in finding negligence on the part of the driver of a motor truck in approaching a street intersection on the left or wrong side of the street, and first swinging to the right as though to cross over, and then suddenly veering to the left to turn at the crossing, and colliding with a motorcyclist who was misled and unable to avoid the collision. *Zuccone v. Main Fish Co*..... 441

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7. MUNICIPAL CORPORATIONS (383)—USE OF STREETS—CONTRIBUTORY NEGLIGENCE. A motorcyclist, approaching a street intersection, at 12 miles an hour, is not guilty of contributory negligence, as a matter of law, in failing to avoid a collision with a motor truck, which was on the wrong side of the street, and first turned to the right as though to cross over, and then suddenly turned to the left without warning into the cross street. *Zuccone v. Main Fish Co.* 441

8. MUNICIPAL CORPORATIONS (391)—USE OF STREETS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The contributory negligence of a pedestrian, struck by a backing automobile at a street crossing, in failing to look in the direction after the auto had passed him, is for the jury, where he was giving his attention to and waiting for another automobile which was passing between him and the defendant's automobile, and the time was short and circumstances such that plaintiff might be justified in assuming that it was not going to be backed over the line of the sidewalk. *Westervelt v. Schwabacher* 418

9. MUNICIPAL CORPORATIONS (405) — TORTS — OF POLICE OFFICERS — ABATEMENT OF NUISANCE—LIABILITY—PLEADING. A complaint alleging that a city, "through its duly constituted officers, determined" that plaintiff's place of business constituted a nuisance, will not by inference be considered as alleging that any court of the city, or that the city council by ordinance, had determined the fact; in view of Rem. Code, § 287, as to the manner of pleading such a determination, and § 291, providing for the pleading of an ordinance by title and date of passage. *Hotel Cecil Co. v. Seattle*..... 460

10. SAME (405). A complaint alleging the abatement and destruction, by police officers acting as agents of the city of Seattle, of plaintiff's place of business as a nuisance, without alleging affirmative action by the city council, is subject to general demurrer, in that it fails to allege that the officers represented the city acting for itself in its corporate, as distinguished from its governmental (and nonliability) capacity; in view of Rem. Code, § 7507, subd. 31, including, in the enumeration of corporate powers, for which the city would be liable, the power to declare nuisances and abate the same, and of Seattle charter, art. 4, § 18, subd. 31, providing that the city may, by ordinance and not otherwise, declare nuisances and provide for the abatement of the same. *Hotel Cecil Co. v. Seattle* 460

11. MUNICIPAL CORPORATIONS (405-407)—TORTS—GOVERNMENTAL FUNCTIONS—PARK—CONSTRUCTION OF DAM. The improvement of a city park not for profit being the exercise of a governmental function,

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the city is not liable for the negligent construction of a dam backing up the water of a stream to the damage of an upper riparian proprietor. *Nelson v. Spokane*..... 219

12. MUNICIPAL CORPORATIONS (473, 479)—DEFECTIVE SEWERS—ACTIONS FOR INJURIES—CONTRIBUTORY NEGLIGENCE. There can be no recovery for damages from flooding and injury to goods, where the loss was due to the concurrent negligence of the city in the maintenance of sewers of insufficient capacity to carry off an average rainfall, and the contributory negligence of the owner in failing to keep clean and in proper repair a back water valve required by ordinance in all cellar and basement drains. *Woolworth Co. v. Seattle*..... 629

Murder:

See HOMICIDE.

Mutuality:

Of contract, see CONTRACTS, 1.

Necessity for mutuality of remedy by specific performance, see SPECIFIC PERFORMANCE, 2.

Names:

Prohibiting use of word "trust" in corporate name as taking of property without due process, see CONSTITUTIONAL LAW, 2.

Use of word "trust" in corporate name, see CORPORATIONS, 1, 2.

Indorsement of names of witnesses on information, see CRIMINAL LAW, 5.

Filing certificate of assumed name, see PARTNERSHIP.

Assessment of personal property in wrong name, see TAXATION, 1.

Navigable Waters:

Bodies and streams of water not capable of navigation, see WATERS AND WATER COURSES.

Necessity:

Of property for appointment of guardian of estate of minors, see GUARDIAN AND WARD, 3.

Negligence:

Joint liability of carriers in negligent maintenance of ferry approach, see CARRIERS, 4-6.

Direct or remote consequences of injury, see DAMAGES, 1.

In use of highway, see HIGHWAYS.

Of employers, see MASTER AND SERVANT.

Of driver of vehicle on city street, see MUNICIPAL CORPORATIONS, 6-8.

Liability of cities for torts, see MUNICIPAL CORPORATIONS, 9-12.

Pleading negligence in action against carrier for injuries to passenger, see PLEADING, 1.

Negligence—Continued.

Civil liability of officers for in attempt to arrest without warrant, see SHERIFFS AND CONSTABLES.

Of person injured by street car, see STREET RAILROADS.

Negotiable Instruments:

See BILLS AND NOTES.

Bills of lading, see CARRIERS, 2.

Notes:

Promissory notes, see BILLS AND NOTES.

Notice:

Of adoption proceedings, see ADOPTION, 1-3.

Of delivery of materials to contractor on highway work, see COUNTIES, 2.

Pleading notice of claim against county, see COUNTIES, 6.

By insured of total disability as excuse for nonpayment of premium, see INSURANCE, 1.

Defects or danger as element of assumption of risk by servant, see MASTER AND SERVANT, 3.

Duty of foreman to notify employees of change making appliance dangerous, see MASTER AND SERVANT, 4.

To owner of assessment of tax, see TAXATION, 1.

Nuisance:

Abatement of used in liquor traffic, see INTOXICATING LIQUORS, 3.

Destruction by police officers of place of business as nuisance, see MUNICIPAL CORPORATIONS, 9, 10.

Objections:

To evidence waiver of, see APPEAL AND ERROR, 10.

To amendment of pleading as waiver of special appearance, see APPEARANCE.

To evidence for purpose of review, see CRIMINAL LAW, 11.

Obligation of Contract:

Laws impairing, see CONSTITUTIONAL LAW, 1.

Officers:

Authority to arrest without warrant, see ARREST.

Actions between corporate officers, see CORPORATIONS, 3.

Civil liability for arrest without warrant, see FALSE IMPRISONMENT.

Liability of municipality for torts of officers, see MUNICIPAL CORPORATIONS, 9, 10.

Sheriffs or constables, see SHERIFFS AND CONSTABLES.

Opinion Evidence:

In criminal prosecution, see CRIMINAL LAW, 4.
In civil actions, see EVIDENCE, 3.

Opinions:

Representations as expressions of opinion, see FRAUD, 1.

Oral Contracts:

See FRAUDS, STATUTE OF, 1.
Specific performance, see SPECIFIC PERFORMANCE, 3, 7.

Oral Leases:

See LANDLORD AND TENANT, 1, 2.

Ordinances:

Jurisdiction of police court on violation of municipal ordinances, see MUNICIPAL CORPORATIONS, 4, 5.

Parcels:

Sale of personal property in parcels, see TAXATION, 5.

Parent and Child:

Adoption of children, see ADOPTION.
Custody and support of children on divorce, see DIVORCE.

Parks:

Liability of city for negligent construction of dam in city park, see MUNICIPAL CORPORATIONS, 11.

Parol Evidence:

See EVIDENCE, 4-10.

Parties:

Persons entitled to notice of adoption proceedings, see ADOPTION, 2.
Suit by assignee in own name, see ASSIGNMENTS.
Persons who may marry, see MARRIAGE, 1, 3-5.
On foreclosure of mechanics' lien, see MECHANICS' LIENS, 5.
Liable for money received, see MONEY RECEIVED.

Partnership:

1. PARTNERSHIP (8, 41)—LIABILITIES OF DORMANT PARTNERS—ESTOPPEL. Where articles of limited partnership were not drawn under Rem. Code, §§ 8359-8368, nor a certificate of an assumed business name filed for the protection of the public, as required by Id., § 8369, a dormant or silent partner constitutes the visible partners agents of the partnership, and a creditor may offset his debt against the partnership. *Hanson v. Roesch*..... 257

Partnership—Continued.

2. SAME (20)—FIRM NAME—RIGHT TO USE—STATUTES. The filing of a certificate of an assumed name is not required of one doing business in the name of a company containing his full name as proprietor, he being the only person interested therein, in view of Rem. Code, § 8372, providing that nothing in the act shall prevent the lawful use of a partnership designation if the same includes the real names of all the parties interested. *McGillivray v. Columbia Salmon Co.* 623

3. PARTNERSHIP (55)—ACTIONS—CAPACITY TO SUE—CERTIFICATE OF ASSUMED NAME—RAISING ISSUE—STATUTES. Where, upon demurrer to a complaint by a copartnership which failed to allege the filing of a certificate of assumed name in the county where it did or intended to do business, an amended complaint was filed alleging the filing of the certificate in K. county and issue was joined by general denial, the capacity of the plaintiff to sue was sufficiently raised; and under Rem. Code, §§ 8369-8373, requiring plaintiff to allege and prove capacity, there was a complete failure of proof, where it appeared that plaintiff was organized to do business in P. county, and had no business and had never done any in K. county. *Peterson v. Morris* 507

4. PARTNERSHIP (55)—ACTIONS—CAPACITY TO SUE—ASSUMED NAMES—STATUTES. Rem. Code, §§ 8369-8373, providing for the filing of certificates by persons doing business under an assumed name, and forbidding the maintenance of an action without alleging and proving such filing, is sufficiently complied with by pleading and proving the filing before commencement of the trial. *McGillivray v. Columbia Salmon Co.* 623

Part Performance:

As taking contract out of operation of statute of frauds, see SPECIFIC PERFORMANCE, 3.

Passengers:

Care required as to intending passengers, see CARRIERS, 3.

Payment:

See TENDER.

Promise to pay debt of another, see FRAUDS, STATUTE OF, 1.

Failure of memorandum of sale to fix time for, see FRAUDS, STATUTE OF, 3, 4.

Of premiums on total disability of insured, see INSURANCE, 1.

Recovery of advances for benefit of another, see MONEY LENT.

Of agent for principal, see PRINCIPAL AND AGENT, 3.

Recovery of purchase money paid on contract for land, see VENDOR AND PURCHASER, 1, 6.

Performance:

Of contract for broker's commission, see BROKERS.
Of contract, see CONTRACTS, 6.
Part performance as taking contract out of operation of statute of frauds, see SPECIFIC PERFORMANCE, 3.
Substantial performance of contract for life support in consideration of contract to devise, see WILLS, 4.

Permits:

For shipment of liquor, see INTOXICATING LIQUORS, 2.

Personal Injuries:

To passenger, see CARRIERS, 3-8.
Proximate or remote cause of injury, see DAMAGES, 1.
Measure of damages, see DAMAGES, 2.
To employee or third person, see MASTER AND SERVANT.
To person in city street, see MUNICIPAL CORPORATIONS, 6-8.
To persons on or near street railroad tracks, see STREET RAILROADS.

Personal Property:

Wrongful conversion, see TROVER AND CONVERSION.

Personal Taxes:

See TAXATION.

Place:

Of sale of personal property for nonpayment of tax, see TAXATION, 5.

Pleading:

Objections to amendment as waiver of special appearance, see APPEARANCE.
In action for injuries to passengers, see CARRIERS, 6, 7.
Notice of claim against county, see COUNTIES, 6.
Necessity for pleading estoppel, see ESTOPPEL, 3.
In action for relief on ground of fraud, see LIMITATION OF ACTIONS, 3.
In action for assault by servant, see MASTER AND SERVANT, 8.
Complaint in action for damages for destruction by police officers of place of business as nuisance, see MUNICIPAL CORPORATIONS, 9, 10.
Capacity of partnership to sue, see PARTNERSHIP, 3, 4.
Damages for loss of bargain, on rescission by vendor, see VENDOR AND PURCHASER, 3.

1. PLEADING (6)—CONCLUSIONS—"NEGLIGENT." A complaint against a carrier by a passenger for personal injuries, is sufficient where it sets out the facts and breach of legal duty, although it fails to use the term negligent, or allege that a defect was dangerous. *Hart v. King County* 485

Pleading—Continued.

2. PLEADING (183)—VARIANCE—EXTENT IN ACTION ON CONTRACT. In an action for services by attorneys under a complaint alleging the employment and performance until wrongfully discharged, it is not a fatal variance to prove the employment, a voluntary withdrawal, and a subsequent reemployment and performance thereunder until wrongfully discharged. *Roche v. Madar*..... 21

Pledges:

Effect of assignment by debtor for creditors, upon collateral security held by creditor, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Conversion by pledgee of mortgage, see TROVER AND CONVERSION, 2.

1. PLEDGES (1)—CREATION OF LIEN—AFTER ACQUIRED PROPERTY. A provision in a conditional sales contract pledging to the vendor all of the vendee's property then owned or thereafter acquired as security for the purchase price, does not create a lien thereon, so as to constitute the same a preferred claim as against other creditors upon property of the vendee in the hands of a receiver. *Union Machinery & Supply Co. v. McCush*..... 62

Police Courts:

Jurisdiction in cities of third class, see MUNICIPAL CORPORATIONS, 4, 5.

Policy:

Of insurance, see INSURANCE.

Port Districts:

Authority to manufacture ice, see MUNICIPAL CORPORATIONS, 1-3.

Possession:

Of fish or crabs during closed season, see FISH.

Of whiskey in automobile, see INTOXICATING LIQUORS, 1.

Wrongful possession by receiver after demand for property conditionally sold insolvent, see RECEIVERS.

By sheriff to distrain for personal taxes on railroad and equipment, see TAXATION, 2.

Powers:

Of county in operation and conduct of ferry, see COUNTIES, 1, 4.

Of port district to manufacture ice in excess of needs, see MUNICIPAL CORPORATIONS, 1-3.

Of state to provide qualifications for members of Congress, see UNITED STATES.

Practice:

See APPEAL AND ERROR; CRIMINAL LAW.

Common law rules of procedure, see COMMON LAW.

Preferences:

Effect of proceedings in bankruptcy, see BANKRUPTCY.
By insolvent corporation, see CORPORATIONS, 5, 6.
In fraudulent conveyance, see FRAUDULENT CONVEYANCES.

Prejudice:

Ground for reversal in civil actions, see APPEAL AND ERROR, 12-17.
Ground for reversal in criminal prosecution, see CRIMINAL LAW, 12, 13.
As affecting right to claim estoppel, see ESTOPPEL.

Premiums:

Total disability as excuse for nonpayment of premium, see INSURANCE, 1.

Presumptions:

As to marriage, see MARRIAGE, 2.

Price:

Inadequacy of as ground for vacating tax sale of personal property, see TAXATION, 4.
Action by vendor for price of land sold, see VENDOR AND PURCHASER, 4, 5.

Principal and Agent:

See BROKERS.
Authority of agents of carrier as to bills of lading, see CARRIERS, 2.
Agent of foreign corporation for purpose of service of process, see CORPORATIONS, 7, 8.
Admissions by agents, see EVIDENCE, 2.
Master's liability for wrongful acts or commissions of servant, see MASTER AND SERVANT, 8, 11.

1. PRINCIPAL AND AGENT (7)—RELATION—TESTIMONY OF AGENT. The agent is competent to testify to the fact of agency. *Pacific Power & Light Co. v. White*..... 528

2. SAME (9)—RELATION—EVIDENCE—SUFFICIENCY. An agency is sufficiently established where it was testified to by the agent, and proven by letters from the principal to him, and by evidence of payments and other transactions between them. *Pacific Power & Light Co. v. White*..... 528

3. PRINCIPAL AND AGENT (69)—RIGHTS AS TO THIRD PARTIES—ACTIONS—BY AGENT. A bank paying money as agent under a mistake of fact and contrary to the strict directions of its principal, may sue to recover it back. *Bank of California National Association v. Mortgage Company, Holland-America*..... 196

Principal and Surety:

Sureties on contractor's bond, see COUNTIES, 2, 3.
Contracts of guaranty, see GUARANTY.

Priorities:

Of mechanics' liens, see MECHANICS' LIENS, 2-4.
Of pledgees, see PLEDGES.

Process:

Service on agent of foreign corporations, see CORPORATIONS, 7, 8.

1. PROCESS (41)—PROOF OF SERVICE—BURDEN OF PROOF. After judgment, the burden is upon the person attacking the service to show by clear and convincing evidence that the same was irregular. *Allen v. Starr*..... 246

Promise:

To pay debt of another, see FRAUDS, STATUTE OF, 1.

Promissory Notes:

See BILLS AND NOTES.

Proof:

Of service of process, see PROCESS.

Propaganda:

Of I. W. W. as evidence in prosecution for criminal anarchy, see CRIMINAL LAW, 3.

Property:

Taking for public use, see EMINENT DOMAIN.
Necessity of for appointment of guardian of estate of minors, see GUARDIAN AND WARD, 3.
Protection of rights of property by injunction, see INJUNCTION.
Division on annulment of marriage, see MARRIAGE, 5.
In hands of receiver, see RECEIVERS.

Provisos:

In statutes, see STATUTES, 2, 3.

Proximate Cause:

Direct or remote consequences of injury, see DAMAGES, 1.
Of accident, see HIGHWAYS.

Publication:

Relating to court proceedings, as contempt, see CONTEMPT.

Public Improvements:

By counties, see COUNTIES, 2, 3.

Public Lands:

Mineral lands, see MINES AND MINERALS.

Public Policy:

Contracts against public policy, see CONTRACTS, 3.

Public Service Commission:

Apportionment of cost of interlocking devices at grade crossing, see RAILROADS.

Public Use:

Taking property for public use, see EMINENT DOMAIN.

Qualifications:

Of members of Congress, see UNITED STATES.

Question for Jury:

In action for injuries to passenger, see CARRIERS, 8.
In action for injuries to servant, see MASTER AND SERVANT, 10.
Contributory negligence of person struck by backing automobile, see MUNICIPAL CORPORATIONS, 8.
Negligence of person struck by street car, see STREET RAILROADS.

Railroads:

Carriage of goods and passengers, see CARRIERS, 1, 2.
Master's liability for injury to employee of railroad doing interstate business, see MASTER AND SERVANT, 1.
Injuries to persons on or near street railway tracks, see STREET RAILROADS.
Taxation of railroad property, see TAXATION.

1. RAILROADS (29)—CONSTRUCTION — CROSSINGS — APPORTIONMENT OF COSTS. In apportioning the costs of interlocking devices to be maintained at a grade crossing, the public service commission should not be governed by the priority of the pioneer road, nor by the character of the service or construction by the crossing road; but is to exercise its discretion on the resulting convenience and inconvenience. *State ex rel. Tacoma Eastern R. Co. v. Northern Pac. R. Co.* 405

2. SAME (29). In the absence of abuse or arbitrary action, the courts will not review the discretion of the public service commission in apportioning the cost of interlocking devices; and no abuse appears in apportioning two-thirds of the cost to the petitioner seeking to cross a main line road by its branch line, to serve Camp Lewis on request of the government; considering the greater number of trains run on the main line, and the fact that the branch line was for the benefit of territory devoted to a particular use. *State ex rel. Tacoma Eastern R. Co. v. Northern Pac. R. Co....* 405

Real Estate Agents:

See BROKERS.

Real Property:

Effect of statute of frauds on agreement relating to real property, see FRAUDS, STATUTE OF, 2.

Conveyance, see VENDOR AND PURCHASER.

Venue of actions, see VENUE.

Rebuttal:

Scope of evidence in rebuttal in criminal cases, see CRIMINAL LAW, 6.

Receipts:

Parol evidence varying receipts, see EVIDENCE, 4, 5.

Receivers:

Damages for detention after default of property conditionally sold, as claim against estate of insolvent, see SALES, 13.

1. RECEIVERS (36)—PROPERTY—TITLE—PROPERTY CONDITIONALLY SOLD. In replevin against the receiver of an insolvent vendee in a conditional sales contract, the receiver's wrongful detention of the property after notice of forfeiture of the sales contract and demand for return of the property, subjects the receiver to the legal measure of damages usual in such cases, and not to a contractual measure provided for in the conditional sales agreement, to which the receiver was not a party. *Union Machinery & Supply Co. v. McCush* 62

2. SAME (36). In such a case, the receiver would not be personally liable for legal expenses contracted for by the seller, in addition to statutory costs and disbursements, nor for the cost of returning the property from its place of detention stipulated for in the bill of sale—since the receiver did not assume the insolvent's contracts; nor could the same be made preferred claims against the insolvent's estate. *Union Machinery & Supply Co. v. McCush*..... 62

3. RECEIVERS (53)—MANAGEMENT OF PROPERTY—CONDITIONAL SALES CONTRACT—EXPENSES OF LITIGATION. Upon replevin against the receiver of an insolvent vendee in a conditional sales contract, for wrongful detention of the property after demand upon the receiver, the vendee's estate cannot be charged with the expenses of the litigation. *Union Machinery & Supply Co. v. McCush*..... 62

Records:

Transcript on appeal or writ of error, see APPEAL AND ERROR, 3-7.

Files and records of cause as evidence of value of services, see ATTORNEY AND CLIENT, 8.

Records as evidence, see CRIMINAL LAW, 3.

Reformation of Instruments:

1. REFORMATION OF INSTRUMENTS (15) — EQUITY (41) — LACHES. Where, by mistake, a deed omitted a clause requiring the grantees to assume a mortgage, and the mistake was not discovered until foreclosure of the mortgage, a cause of action for reformation of the deed did not accrue until entry of judgment of deficiency and notice thereof; hence the judgment debtors were not guilty of laches preventing suit for reformation of the deed, where the delay caused no loss to the grantees. *Blackburn v. Vander Aarde*.... 676

Regulation:

Transportation and possession of intoxicating liquors, see INTOXICATING LIQUORS.

Release:

Effect of assignment for benefit of creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Partial release of mortgage, see MORTGAGES, 2.

Remedial Acts:

Construction of, see STATUTES, 1.

Removal:

Of buildings subject to lien, see MECHANICS' LIENS, 1.

Of teachers, see SCHOOLS AND SCHOOL DISTRICTS, 1, 3.

Rent:

Double damages for, see LANDLORD AND TENANT, 4.

Repeal:

Of act providing for appointment of guardian by will, see GUARDIAN AND WARD, 1.

Of law relating to applications for lease of state mineral lands, see MINES AND MINERALS, 1.

Replevin:

Suits against receivers, see RECEIVERS.

Reports:

Of unofficial organization as evidence, see CRIMINAL LAW, 2.

Representation:

Representation of corporations by officers or agents, see CORPORATIONS, 4.

Reputation:

Proof of marriage, see MARRIAGE, 2.

Requests:

For instructions in criminal prosecutions, see CRIMINAL LAW, 10.

Rescission:

Right of shipper to rescind sale of liquor after seizure as contraband, see INTOXICATING LIQUORS, 2.

Of contract for sale of land, see VENDOR AND PURCHASER, 1, 2, 3, 6.

Reserve Fund:

In contract for county highway work, see COUNTIES, 2.

Res Judicata:

Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 18-20.

Revenue:

See TAXATION.

Review:

See CERTIORARI.

In civil actions, see APPEAL AND ERROR.

In criminal prosecution, see CRIMINAL LAW, 11-13.

Revocation:

Of license respecting water rights, see WATERS AND WATER COURSES, 2.

Riparian Owners:

Right to damages from city for negligent construction of dam in city park, see MUNICIPAL CORPORATIONS, 11.

Risks:

Assumed by employee, see MASTER AND SERVANT, 2, 3.

Roads:

Negligence in driving truck, see HIGHWAYS.

Streets in cities, see MUNICIPAL CORPORATIONS, 6-8.

Sales:

Conditional sale distinguished from chattel mortgage, see CHATTEL MORTGAGES.

Mutuality of contract, see CONTRACTS, 1.

Conditional sales contract as against public policy, see CONTRACTS, 3.

Parol evidence to vary contract of sale, see EVIDENCE, 8, 9.

Fraud in sale of corporate stock, see FRAUD, 2, 3.

Requirements of statute of frauds, see FRAUDS, STATUTE OF, 3, 4.

Pledge of after acquired property by vendee in conditional sales contract as creating preferred claim against property in hands of receiver, see PLEDGES.

Sales—Continued.

Replevin against receiver for property conditionally sold insolvent, see RECEIVERS.

Tax sales, see TAXATION.

Of real property, see VENDOR AND PURCHASER.

1. SALES (29)—CONSTRUCTION OF CONTRACT—SUBJECT-MATTER—"SURPLUS" HOPS. A contract to purchase 40,000 lbs. of hops, more or less, being all the "surplus hops grown on" specified yards, after delivery of 22,000 lbs. previously contracted to the buyer and 20,000 lbs. contracted to a third person, does not include any of the hops contracted to such third person; and the seller cannot repurchase from such third person and offer the same, on failure of the crop to produce the 40,000 lbs., more or less, in contemplation at the time of the sale. *Tacoma Savings Bank & Trust Co. v. Herren* 437

2. SALES (77)—FAILURE TO DELIVER—EXCUSES. The rejection of one sample of wheat, submitted at a place other than the place of delivery, does not excuse delivery according to the terms of sale covering several grades, especially where the parties thereafter agreed upon an extension of time for delivery. *Dement Brothers Co. v. Coon*..... 603

3. SAME (96-99)—RIGHTS OF BUYERS AS TO THIRD PERSONS—TITLE—INNOCENT PURCHASERS. Since the doctrine of sale in market overt does not obtain in this country, a buyer of an automobile from a dealer in possession acquires no rights as an innocent purchaser from one in possession with apparent title, where the dealer had previously sold it under a conditional sales contract reserving title, and had assigned the contract of sale with all title to the property and the conditional sales vendee surrendered the automobile to the vendor. *State Bank of Black Diamond v. Johnson*..... 550

4. SALES (165)—REMEDIES OF BUYER—COUNTERCLAIM FOR BREACH OF WARRANTY—MEASURE OF DAMAGES. Upon counterclaim for breach of warranty, in an action for the price of graders, the defendants' measure of damages would be the difference between the purchase price and the actual value of the goods when delivered, the sale price of machinery being *prima facie* the value, and any evidence of value for the particular job in excess thereof is inadmissible as speculative. *Baker Manufacturing Co. v. Hall*..... 15

5. SAME (165). In an action for the balance due on the purchase price of machinery, in which there was a counterclaim for damages for breach of warranty, it is error to give instructions limiting the allowance for damages to the balance due. *Baker Manufacturing Co. v. Hall*..... 15

6. SALES (166)—COUNTERCLAIM FOR DAMAGES—INSTRUCTIONS. Upon an issue as to breach of a contract for the sale of lumber, error

Sales—Continued.

cannot be predicated upon the failure to include a charge that the obligation to deliver is as great as the obligation to make payment, where the court properly instructed as to the duty of the seller to deliver and make performance, and as to the mutuality of the obligations. *Deer Park Lumber Co. v. Oregon-Washington Lumber & Manufacturing Co.* 531

7. SALES (179-1)—CONDITIONAL SALES—ASSIGNMENT OF CONTRACT—EFFECT. The vendor in a conditional sales contract reserving the title until the contract price was fully paid, may sell and transfer its title, and the intention to do so is manifested by a written indorsement on the bill of sale transferring all the vendor's right, title and interest in and to the within note and conditional bill of sale. *State Bank of Black Diamond v. Johnson*..... 550

8. SAME (179-1, 182) — ASSIGNMENT OF CONTRACT — REMEDIES OF SELLER—ELECTION. Where a conditional sales contract retaining title in the vendor embodied a promissory note for the balance due, all as part of one instrument, an assignment of the conditional bill of sale and note guaranteeing its payment and fulfillment, merely renders the assignor liable as a guarantor should the assignee elect to seek recovery of the balance of the debt, and does not constitute an election that would vest title to the article sold in the conditional sales vendee. *State Bank of Black Diamond v. Johnson* 550

9. SAME. After assignment of a conditional sales contract of an automobile, surrender by the vendee to the vendor with notice of the assignment, vests no title in the vendor, who can convey no title to an innocent purchaser, regardless of the fact that there was no constructive notice of the assignment under the recording laws; since the buyer acquires no title where the seller had none. *State Bank of Black Diamond v. Johnson*..... 550

10. SALES (182) — CONDITIONAL SALES — CONTRACTS — CONSTRUCTION. The expenses of a visit by the vendor to the vendee in a conditional sales contract, in an endeavor to adjust the claim, and expenses in returning the property, are not recoverable as expenses incurred in collecting the claim or returning the property as stipulated in the contract, in the absence of any proof that the expenses were reasonable or necessary. *Union Machinery & Supply Co. v. McCush* 62

11. SAME (182). Under a conditional sales contract expressly agreeing to repay freight and the cost of insurance, advanced by the vendor, such items are recoverable as being in addition to the purchase price, whether there was a forfeiture of the contract or not. *Union Machinery & Supply Co. v. McCush*..... 62

12. SALES (182)—CONDITIONAL SALES — DEFAULT — DAMAGES FOR DETENTION. Damages for detention after default of machinery condi-

Sales—Continued.

tionally sold, cannot be recovered until lapse of a reasonable time for its return. *Union Machinery & Supply Co. v. McCush*..... 62

13. SAME (182). Damages stipulated in a conditional sales contract for wrongful detention after demand cannot be allowed as a claim against an insolvent vendee's estate, where the property has passed into the hands of a receiver and the default was that of the receiver. *Union Machinery & Supply Co. v. McCush*..... 62

Sales in Bulk:

Compliance with statute as affecting preference by creditor in purchase of corporate assets, see CORPORATIONS, 5.

Salmon:

Statute regulating possession or sale during closed season as exercise of police power, see FISH, 1.

Schedule:

Of carrier's charges, see CARRIERS, 1.

Schools and School Districts:

Parol evidence to explain teacher's contract, see EVIDENCE, 10.

1. SCHOOLS AND SCHOOL DISTRICTS (40)—CLAIMS—BREACH OF TEACHER'S CONTRACT—NECESSITY OF APPPEAL. Where an order discharging a principal of schools has been reversed on his appeal to the county superintendent, and the school board, by indirection, sought a reversal by offering a different employment compelling the principal to work under a "superintendent" who was formerly a teacher under him, the principal is under no obligation to take a second appeal whether the action of the board be considered another dismissal or an offer of new employment. *Williams v. School District No. 189* 659

2. SCHOOLS AND SCHOOL DISTRICTS (48-50)—TEACHERS—CONTRACTS—CONSTRUCTION. A teacher's contract providing that the teacher shall forfeit pay for the two summer months when excused "at his own request" upon two months' notice to the board, leaves excuse from work optional with the teacher. *Norton v. State*..... 248

3. SCHOOLS AND SCHOOL DISTRICTS (49) — TEACHERS — CONTRACT — BREACH. After the direct action of a school board in discharging a principal of schools had been reversed by the county superintendent, the board cannot designate a subordinate teacher as "superintendent" of schools and require the principal to work under him; and it is immaterial that Rem. Code, § 4524, provides for the election of a superintendent or principal to have charge of the schools, the position and not the name being material. *Williams v. School District No. 189* 659

Searches and Seizures:

Under laws relating to intoxicating liquors, see INTOXICATING LIQUORS, 2, 3.

Secondary Evidence:

In civil actions, see EVIDENCE, 1.

Self-Defense:

Right of accused to instruction on manslaughter upon plea of self-defense, see HOMICIDE, 6, 7.

Cross-examination of accused, upon issue of self-defense, see WITNESSES.

Separation Agreement:

Providing for custody and support of children, see DIVORCE, 2.

Service:

Of process, see PROCESS.

Implied contract to pay for services, see WORK AND LABOR.

Set-Off and Counterclaim:

In action on bill or note, see BILLS AND NOTES.

Estoppel to plead set-off as against assigned account, see ESTOPPEL.

In actions for breach of warranty, see SALES, 4.

In action for breach of contract, see SALES, 6.

Counterclaim in action by buyer to recover money paid, see VENDOR AND PURCHASER, 6.

Sewers:

Liability of city for damages by sewer, see MUNICIPAL CORPORATIONS, 12.

Sheriffs and Constables:

1. SHERIFFS AND CONSTABLES—CIVIL LIABILITY FOR NEGLIGENCE—ATTEMPT TO ARREST WITHOUT WARRANT. It is unlawful for officers to combine to stop travelers on the highway in an attempt to find and arrest without warrant some person transporting liquors in violation of the prohibition law. *Mitchell v. Hughes*..... 231

Shipment:

Of liquors, see INTOXICATING LIQUORS, 2.

Shipping:

Personal injuries to seamen, see MASTER AND SERVANT, 2, 3, 10.

Special Appearance:

See APPEARANCE.

Specific Performance:

Of contract to devise, see WILLS, 3, 5.

1. SPECIFIC PERFORMANCE (1)—EXISTENCE OF OTHER REMEDY. A contract employing attorneys for a specific fee—a certain number of shares of corporate stock—may be specifically enforced, without relegating the attorneys to their remedy in damages. *Roche v. Madar* 21

2. SPECIFIC PERFORMANCE (2)—MUTUALITY OF REMEDIES — EXECUTED CONTRACT. Specific performance of a contract employing attorneys agreeing to pay by transferring corporate stock cannot be denied on the ground of want of mutuality of remedies, or right to specific performance against the attorneys, where the contract had been fully performed upon their part. *Roche v. Madar*..... 21

3. SPECIFIC PERFORMANCE (24-1)—FRAUDS, STATUTE OF (46)—GIFT OF LAND—PART PERFORMANCE. An oral promise to make a gift of land accepted by the promisee, who enters into possession and makes valuable improvements, will be specifically enforced, the making of the improvements being equivalent in equity to an actual consideration and sufficient part performance to take the case out of the operation of the statute of frauds. *Raymond v. Hattrick*..... 619

4. SPECIFIC PERFORMANCE (25)—CONTRACTS TO DEVISE. Inadequacy of consideration is not a sufficient objection to specific performance of a contract to devise lands to a son-in-law for life support, since the testator may, in the absence of fraud, fix upon any lawful consideration sounding in personal service. *Alexander v. Lewes*.. 32

5. SPECIFIC PERFORMANCE (25) — CONTRACTS ENFORCIBLE — CONTRACT TO DEVISE. Contracts to devise real estate in consideration of an agreement for life support are personal and will not be specifically enforced beyond the lifetime of the person to whom the promise was made, such person having died before the testator. *Alexander v. Lewes* 32

6. SAME (38) — PROCEEDINGS — TIME TO SUE AND LACHES. Laches, short of the statute of limitations, will not bar an action for specific performance, in the absence of any special reason why a shorter period should be enforced. *Roche v. Madar*..... 21

7. SAME (38)—LIMITATION OF ACTIONS (38, 44)—DEMAND. Limitations against an action to specifically enforce a promise to make a gift of land to a son-in-law and daughter, in consideration of living upon the land and the making of improvements, does not begin to run until demand for performance and refusal, in view of the intimate relations of the parties and the fact that there was no time fixed for performance or notice of breach. *Raymond v. Hattrick* 619

Stare Decisis:

Rule of decision on appeal, see APPEAL AND ERROR, 18-20.

Statement:

Of case or facts for purpose of review, see APPEAL AND ERROR, 3-7.

States:

Lease of state mineral lands, see MINES AND MINERALS, 1.
Power to provide qualifications for members of Congress, see UNITED STATES.

Statutes:

See FRAUDS, STATUTE OF.
Holder of note in due course, see BILLS AND NOTES.
Laws impairing obligation of contracts, see CONSTITUTIONAL LAW. 1.
Authorizing incorporation of trust companies, see CORPORATIONS, 1, 2.
Persons entitled to claim against contractor's bond, see COUNTIES, 3.
Actions against county, see COUNTIES, 5.
Allowance to surviving wife, see EXECUTORS AND ADMINISTRATORS.
Possession of salmon or crabs during closed season, see FISH.
Repeal of act providing for appointment of guardian by will, see GUARDIAN AND WARD, 1.
Elements of offense of manslaughter, see HOMICIDE, 1.
Searches and seizures of implements, etc., used in liquor traffic, see INTOXICATING LIQUORS, 3.
Execution and validity of leases, see LANDLORD AND TENANT, 1.
Statutes of limitation, see LIMITATION OF ACTIONS.
Construction of act exempting interstate railways from operation of workmen's compensation act, see MASTER AND SERVANT, 1.
Construction of act relating to lease of state mineral lands, see MINES AND MINERALS, 1.
Filing certificate of assumed name by partnership, see PARTNERSHIP.
Venue of actions for injury to real property, see VENUE.

1. STATUTES (54)—CONSTRUCTION—REMEDIAL ACT. Statutes providing remedies are to be liberally construed. *State ex rel. King County v. Superior Court, Pierce County*..... 268

2. STATUTES (68)—LEGISLATIVE CONSTRUCTION. The fact that the legislature in amending the act relating to contractor's bonds (Rem. Code, § 1159), added a proviso that the act shall not apply to money loaned or advanced, does not show that it construed the former law (Rem. & Bal. Code, § 1159) to include such items. *American Savings Bank & Trust Co. v. National Surety Co*..... 663

3. STATUTES (74)—CONSTRUCTION—PROVISOS. While the purpose of a proviso is to restrain, and not broaden an act, it may be considered in arriving at the legislative intent. *State v. Ripley*..... 299

Stockholders:

Liability of corporation under contract involving parties holding entire stock, see CORPORATIONS, 2.

Street Railroads:

Carriage of passengers, see CARRIERS, 3-8.

1. STREET RAILROADS (30) — OPERATION — ACTIONS FOR INJURIES — CONTRIBUTORY NEGLIGENCE OF PEDESTRIAN—QUESTION FOR JURY. The contributory negligence of a pedestrian struck by an interurban train is a question for the jury, where he looked and saw no train for a distance of 1,500 feet, and walked parallel with the track 140 feet, and started to cross without again looking. *Johannessen v. Washington Water Power Co* 182

Streets:

See MUNICIPAL CORPORATIONS, 6-8.
Negligent use of highway, see HIGHWAYS.

Striking:

Motions to strike evidence, see TRIAL, 1.

Summons:

Service on agent of foreign corporation, see CORPORATIONS, 7, 8.

Support:

Of children after divorce, see DIVORCE.
Allowance to surviving wife, see EXECUTORS AND ADMINISTRATORS.

Surface Waters:

Injury to adjoining owner by drainage or discharge, see WATERS AND WATER COURSES.

Suspension:

Of attorney, see ATTORNEY AND CLIENT, 1.

Tariffs:

Posting by carrier, see CARRIERS, 1.

Taxation:

1. TAXATION (75)—ASSESSMENT IN WRONG NAME—NOTICE TO OWNER. An assessment of personal property in the wrong name does not invalidate the tax, where the owner knew thereof and had been doing business and paying taxes in such name. *J. K. Lumber Co. v. Ash* 388

2. SAME (131)—PERSONALTY—DISTRAINT—POSSESSION. To distrain for personal property taxes upon a railroad some miles in length, locomotives, cars, cable and equipment at different places, the sheriff need not, under Rem. Code, § 9223a, take physical possession, or do

Taxation—Continued.

more than examine the property and give and post the legal notices. *J. K. Lumber Co. v. Ash*..... 388

3. SAME (131)—SALE OF PERSONALTY—NOTICE. A personal property assessment and tax sale of a logging company's "railroad" and equipment is not void as embracing real estate, where the railroad referred to was upon leased land. *J. K. Lumber Co. v. Ash*.... 388

4. SAME (131)—SALE OF PERSONALTY—INADEQUACY OF PRICE. Inadequacy of price is not ground for setting aside a regular sale of personal property for delinquent taxes. *J. K. Lumber Co. v. Ash* 388

5. SAME (131)—SALE OF PERSONALTY — IN PARCELS — PRESENCE OF PROPERTY. A sale of the personal property of a logging company consisting of a railroad, locomotives, cars, and equipment at different places is not void because not made in parcels and because it was not exhibited to purchasers, where bids in parcels were called for and none received and where there was no one place where it could all have been collected for exhibition with any likelihood of attracting more bidders. *J. K. Lumber Co. v. Ash*... 388

Teachers:

See SCHOOLS AND SCHOOL DISTRICTS.

Tender:

Liability on obtaining money conditionally tendered and refusal to perform, see MONEY RECEIVED.

Restoration or tender as defense to conversion, see TROVER AND CONVERSION, 1.

1. TENDER (7)—CONDITIONS. A conditional tender must be strictly followed or entirely refused. *Bank of California National Association v. Mortgage Company, Holland-America*..... 196

Termination:

Of trust on majority of ward, see GUARDIAN AND WARD, 4.

Terms:

Of leases, see LANDLORD AND TENANT, 1, 2.

Testamentary Capacity:

See WILLS, 1.

Threats:

As evidence in prosecution for murder, see HOMICIDE, 4.

1. THREATS — BLACKMAIL — ACTS CONSTITUTING — ACCESSORIES. An attorney who advises as to and delivers papers intended to extort a settlement of a dispute and the purchase of stock through accusations of crime and threats of publication of alleged events and incidents of the recipient's life, having knowledge or reasonable

Threats—Continued.

grounds of belief as to, and full opportunity to ascertain, its contents before delivery, is guilty of blackmail, under Rem. Code, § 2613, including within the definition of blackmail an accusation of crime with intent to extort or gain any money or property or affect any cause of action or defense, and Id., § 2007, abolishing the distinction between an accessory before the fact and a principal and making aiders and abettors liable as principals. *In re Mills* 278

Timber:

Right to use stream for floating and driving logs, see LOGS AND LOGGING.

Time:

For filing case or statement of facts on appeal or error, see APPEAL AND ERROR, 5, 6.
Performance of contract within reasonable time, see CONTRACTS, 6.
Failure to fix time for payment in contract, see FRAUDS, STATUTE OF, 3, 4.

Title:

Estoppel by clothing another with apparent title, see ESTOPPEL.
Admissibility of evidence, see FORCIBLE ENTRY AND DETAINER.
To mineral location, see MINES AND MINERALS, 2.
Of receivers, see RECEIVERS, 1.
Rights of buyers as to third person, see SALES, 3.
Transfer of title of vendor in conditional sale contract, see SALES, 7.

Tools:

Liability of employer for defects, see MASTER AND SERVANT, 4, 9.

Torts:

See FORCIBLE ENTRY AND DETAINER; FRAUD; TROVER AND CONVERSION.
By counties, see COUNTIES, 4.
Measure of damages, see DAMAGES, 2.
Arrest without warrant, see FALSE IMPRISONMENT.
Negligence in use of highway, see HIGHWAYS.
Of employers, see MASTER AND SERVANT.
Of cities, see MUNICIPAL CORPORATIONS, 9-12.
Of officers, see SHERIFFS AND CONSTABLES.
Injuries caused by operation of street cars, see STREET RAILROADS.

Trade Secrets:

Enjoining use of by former employee in soliciting customers, see INJUNCTION.

Transcripts:

Of record for purpose of review, see APPEAL AND ERROR, 3-7.

Trial:

Review of ruling as dependent on presentation of objection or exception in lower court, see APPEAL AND ERROR, 1, 2.
Review of rulings as dependent on presentation of same by record, see APPEAL AND ERROR, 3-7.
Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 12-17.
In criminal prosecutions, see CRIMINAL LAW.
Instructions in criminal prosecutions, see HOMICIDE, 6, 7.
Right to trial by jury, see JURY.
Instructions in actions for personal injuries, see MASTER AND SERVANT, 2.
Instructions in action on contract of sale, see SALES, 5, 6.
Place of trial, see VENUE.
Examination of witnesses, see WITNESSES.
Instructions in action for services, see WORK AND LABOR.

1. TRIAL (39)—EVIDENCE—MOTION TO STRIKE. A motion to strike all the testimony of experts on land values, admittedly based in part on hearsay, is not too general because of the inclusion of proper preliminary testimony which was material only as associated with the valuations. *Pierce County ex rel. Bellingham v. Duffy* 426

2. TRIAL (64) — DIRECTION OF VERDICT — OBJECTIONS — SUFFICIENCY. Where one of plaintiff's causes of action failed, the supreme court cannot say that the trial court erred in denying general motions for a directed verdict and for verdict *non obstante*, directed to the entire case and both causes of action. *Haines v. Coastwise Steamship & Barge Co*..... 685

3. TRIAL (150)—JUDGMENT NON OBSTANTE — AFFIRMATIVE RELIEF — FINDINGS. Where the court takes a case from the jury and grants affirmative relief, it becomes a trial by the court, requiring findings under Rem. Code § 367. *Hanson v. Roesch*..... 257

4. TRIAL (157)—BY COURT—FINDINGS AND CONCLUSION — CONSTRUCTION AND OPERATION. Under Rem. Code, § 368, providing that findings of the court upon the facts shall be deemed a verdict, the judgment must accord with the findings, which have the effect of a special verdict and control inconsistent conclusions of law. *State v. Twenty Barrels of Whiskey*..... 382

Trial by Jury:

See JURY.

Trover and Conversion:

1. TROVER AND CONVERSION (13)—DEFENSES—RESTORATION OR TENDER —TENDER OF PROPERTY. A mere direction to the owner of property to remove it from defendant's place of business where it was stored

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is not a tender that would absolve the wrong, and there was a conversion, where defendant afterwards sold and delivered the property to a third person, on account of plaintiff's failure to comply with the demand for removal. *Pappas v. General Market Co...* 116

2. TROVER AND CONVERSION (29) — EVIDENCE—SUFFICIENCY—CONNECTION OF DEFENDANT. The evidence fails to show a conversion by the pledgee of a mortgage pledged to it as collateral security, where it appears that the pledgor prosecuted a suit of foreclosure thereon in the name and by consent of the pledgee, and had full control of the suit, and that the mortgaged property was lost by his fault alone, if by any one's, when it sold for only sufficient to pay off prior mortgages. *Du Pont De Nemours Powder Co. v. Pederson*..... 433

Trust Companies:

Right to use word "trust" in corporate name, see CORPORATIONS, 1, 2.

Trust Fund Doctrine:

Liability of creditor under, on purchase of assets of insolvent corporation, see CORPORATIONS, 5, 6.

Ultra Vires:

Implied power of county to maintain approaches and landing places for ferry, see COUNTIES, 1.

Undue Influence:

Procuring making of will, see WILLS, 1.

United States:

1. UNITED STATES (2) — MEMBERS OF CONGRESS — QUALIFICATIONS — STATE REGULATIONS. The Federal Constitution, art. 1, §§ 2 and 5, providing the qualifications of members of Congress and that Congress shall be the sole judge thereof, cannot be added to or varied by the state Constitution, art. 4, § 15, which provides that judges of the supreme and superior courts shall be ineligible to any other office or employment other than a judicial one during the term for which they have been elected. *State ex rel. Chandler v. Howell* 99

2. SAME (2). The fact that the state, in the absence of Federal legislation, can provide for primary elections, does not give it power to provide the qualifications of those seeking nomination for membership in Congress at such primary elections. *State ex rel. Chandler v. Howell*..... 99

Unlawful Detainer:

See FORCIBLE ENTRY AND DETAINER; LANDLORD AND TENANT, 4.

Vacation:

Of decree of adoption, see ADOPTION, 4.
Of default judgment, see JUDGMENT.
Of sale of personal property for taxes, see TAXATION.

Value:

Of attorney's services, see ATTORNEY AND CLIENT, 7.
Of land appropriated for public use as measure of compensation, see EMINENT DOMAIN.
Opinion evidence as to value of property, see EVIDENCE, 3.
Liability for false representations as to value, see FRAUD, 2, 3.

Variance:

Between pleading and proof in civil actions, see PLEADING, 2.

Vendor and Purchaser:

Transfers of ownership of personal property, see SALES.

1. VENDOR AND PURCHASER (53, 162)—RESCISSION BY VENDOR—REMEDIES OF PURCHASER—RECOVERY OF PURCHASE MONEY. Where a contract for the sale of land upon which $500 was paid contained no clause with reference to forfeiture or liquidated damages, and the vendor, pending negotiations as to the title, sold part of the land to another, the contract is thereby rescinded and the purchaser is entitled to recover the purchase money paid, with interest. *Jackson v. White*..... 643

2. VENDOR AND PURCHASER (60)—RESCISSION BY VENDEE—FRAUD—RELIANCE ON REPRESENTATION. A sale of arid land will be rescinded for fraud, where it was induced by the seller's misrepresentation that there was plenty of water to irrigate it, emphasized by a statement of his attorney to the same effect touching on the priority of rights under the law; the buyer having the right to rely on representations peculiarly within the seller's knowledge which were difficult of ascertainment by the vendee. *Sherman v. Parker*.. 610

3. SAME (147, 157)—REMEDIES OF VENDOR—DAMAGES. Where the vendor rescinds the contract and sells part of the land to another, his damage for loss of the bargain must be alleged and proved as any other fact. *Jackson v. White*..... 643

4. VENDOR AND PURCHASER (150)—REMEDIES OF VENDOR—ACTIONS FOR PURCHASE MONEY—DEFENSES—DEFECT IN QUANTITY. In an action for balance due on the purchase price of timber lands, mill and other property, defendant cannot claim a deduction for a shortage in the estimated quantity of 25,000,000 feet of white pine, where the quantity was not guaranteed and the vendees started their own cruise, which indicated to them a shortage before the contract was entered into. *Standard Lumber Co. v. Deer Park Lumber Co*... 84

Vendor and Purchaser—Continued.

5. SAME (156)—REMEDIES OF VENDOR—ACTIONS FOR PURCHASE MONEY—AMOUNT OF RECOVERY. Where there was a sale in gross of timber lands, mill and other property, which was to be paid for by the deduction of the debts of the vendor and $10,000 paid by the vendees, and balance in preferred stock with interest without specifying any time for delivery, in an action for the price upon the vendees' default and refusal to deliver any stock, the vendor is entitled to a judgment in entirety for the balance due payable at once, instead of judgment for future payments evidenced by obligations of the defendant. *Standard Lumber Co. v. Deer Park Lumber Co.* 84

6. SAME (171)—REMEDIES OF PURCHASER—RECOVERY OF PRICE—DEFENSES. The vendor, on rescinding, cannot claim forfeiture and liquidated damages not provided for in the contract, and the same constitutes no defense or counterclaim to an action by the buyer to recover purchase money paid. *Jackson v. White*..... 643

Venue:

Operation and effect of common law rules of practice, see COMMON LAW.

Of action against county, see COUNTIES, 5.

Of prosecution for violation of ordinance of city of third class, see MUNICIPAL CORPORATIONS, 4.

1. VENUE (3)—NATURE AND SUBJECT OF ACTION—INJURY TO REAL PROPERTY—ACTION AGAINST COUNTY. Rem. Code, § 204, providing that actions for the recovery of injuries to real property shall be brought in the county where the subject of the action is situated is general, applying to actions against counties; hence such an action against two counties is local and properly brought in the county where the land was situated, notwithstanding that neither the common law, nor any express statute, authorized an action against a county beyond its limits. *State ex rel. King County v. Superior Court, Pierce County*..... 268

Verdict:

Review on appeal or writ of error, see APPEAL AND ERROR, 11.

Directing verdict in civil actions, see TRIAL, 2.

Waiver:

See ESTOPPEL.

Of error, see APPEAL AND ERROR, 10.

By appearance, see APPEARANCE.

Of right to contest vacation of default judgment, see JUDGMENT, 1.

Wards:

See GUARDIAN AND WARD.

Warranty:

On sale of goods, see SALES, 4, 5.

Waters and Water Courses:

Floating logs on streams, see LOGS AND LOGGING.

Liability of city for obstructing waters of stream through negligent construction of dam in city park, see MUNICIPAL CORPORATIONS, 11.

1. WATERS AND WATER COURSES (56)—LAKES OR SURFACE WATERS, DRAINAGE OR DISCHARGE. The owner of land has no right to remove a natural barrier and permit the waters of natural lakes on his land, with the spring accumulations from rain and snow, to escape and be discharged upon the lower lands of an adjoining owner. *Lemley v. Jones*..... 105

2. SAME (70)—CONTRACTS—LICENSES (17)—REVOCATION. A verbal license to remove a natural barrier and permit natural lakes and surface accumulations to be discharged upon the lower lands of an adjoining owner is revocable at the will of the licensor, although money has been expended thereon. *Lemley v. Jones*..... 105

Waybills:

Secondary evidence of contents, see EVIDENCE, 1.

Widows:

Allowance to on distribution as impairing obligation of debts of deceased, see CONSTITUTIONAL LAW, 1.

Wills:

Parol evidence to show consideration for execution of, see EVIDENCE, 6.

Appointment of guardian by will, see GUARDIAN AND WARD, 1.

Specific performance of contracts to devise, see SPECIFIC PERFORMANCE, 4, 5.

1. WILLS (7)—TESTAMENTARY CAPACITY — EVIDENCE — SUFFICIENCY. The evidence sustains findings of mental competency and lack of duress or undue influence in the making of a will, where, sick unto death, and at times delirious and under the influence of drugs, the testatrix made a will in favor of her husband, named all her children, giving each $50, and the evidence of those in attendance was to the effect that her mind was clear and that she had a perfect understanding of her property; since wills are favored in the law and the testimony to overthrow them must be cogent and convincing. *In re Geissler's Estate*..... 452

2. WILLS (8)—CONTRACT TO DEVISE—VALIDITY. To agree to make a will is within the realm of contract right and the fairness of the agreement must be determined by resort to the relations of the

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parties and the attending circumstances, and past favors may be adopted as part of the consideration. *Alexander v. Lewes*..... 32

3. SAME (8-1)—CONTRACTS TO DEVISE—REQUISITES—CONSIDERATION—EVIDENCE—SUFFICIENCY. Specific performance will be decreed of an agreement to devise to a son-in-law property worth $12,000 in consideration of life support for the testator, who was 83 years of age, together with an assignment of the son-in-law's life insurance, where it was supported by evidence of previous benefits received which were acknowledged in the will, and was coupled with the execution of the will and delivery of a contract for support, without undue influence. *Alexander v. Lewes*..... 32

4. WILLS (8-1)—CONTRACTS TO DEVISE—SUBSTANTIAL PERFORMANCE. It cannot be objected that there was no substantial performance of an agreement for life support in consideration of a contract to devise lands, from the fact that, four days after making the will, the testator voluntarily left and attempted to repudiate the agreement and revoke the will, and shortly after died, where the devisee was in no way responsible for testator's breach of the agreement. *Alexander v. Lewes*..... 32

5. SAME (8-1)—CONTRACTS TO DEVISE—INCIDENTAL RELIEF. In an action to enforce specific performance of a contract to devise lands, heirs to whom the testator devised it cannot be charged with the payment of a mortgage subsequently placed on the land by the testator. *Alexander v. Lewes*..... 32

Witnesses:

Opinion evidence identifying handwriting of accused, see CRIMINAL LAW, 4.

Indorsement of witnesses on information, see CRIMINAL LAW, 5.

Opinions, see EVIDENCE, 3.

Allowance of expert witness fees under workmen's compensation act, see MASTER AND SERVANT, 7.

1. WITNESSES (84)—CROSS-EXAMINATION OF ACCUSED—SELF-DEFENSE. Upon an issue of self-defense, the state is entitled to show by cross-examination that the accused, after an altercation, had found a safe asylum by going to his garage and locking the door, where he obtained a gun with which he shot the deceased, indicating a voluntary return to the fray. *State v. Walker*..... 472

Work and Labor:

Liens for work and materials, see MECHANICS' LIENS.

1. WORK AND LABOR (18) — TRIAL — INSTRUCTION — IMPLIED AGREEMENT. In an action by a nephew to recover for services while a member of his uncle's family, it is proper to instruct that an agree-

Work and Labor—Continued.

ment to pay for the services need not be in any form of writing or oral statement but may be implied from the conduct of the parties and that it is for the jury to determine whether the evidence shows an understanding that plaintiff would be paid. *Lyons v. McElroy* 481

Workmen's Compensation Act:

See MASTER AND SERVANT, 1, 5-7.

Writings:

Best and secondary evidence, see EVIDENCE 1.

Parol evidence to explain or vary writing, see EVIDENCE, 4-10.

Terms and validity of written leases, see LANDLORD AND TENANT, 1.

Writs:

See CERTIORARI; INJUNCTION; PROCESS.